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No. .....

In The

Supreme Court of the United States

October Term, 1984

In re Corrugated Container Antitrust Litigation

GREEN BAY PACKAGING INC.,

Petitioner,

v.

ADAMS EXTRACT COMPANY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Amendment preserves to a party the right to a jury trial of disputed issues of material fact concerning the amount due on a settlement contract.

2. Whether the court of appeals so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by the district court, as to violate procedural due process and require the exercise of this Court's supervisory power.

LIST OF PARTIES

The party appearing as the defendant-appellant before the United States Court of Appeals for the Fifth Circuit and as the defendant before the district court was Green Bay Packaging Inc.

The parties appearing as plaintiffs-appellees before the United States Court of Appeals for the Fifth Circuit and as plaintiffs before the district court were

Accurate Metal Weatherstrip Company, Inc.
Adams Extract Company
After Six, Inc.
Al Barker Publishing Co.
The Amberly Greeting Card Co.
Andre-Boudin Bakeries, Inc.
Arcadia Furniture Corp.
Atlas Container Co., Inc.
Austin Products Co.
Bateman Canning Co.
The Beaumont Co.
Bert Paley Ltd.
Bodines, Inc.
Bookout & Mitchell Supply, Inc.
Bowman Dairy Company, Inc.
Burger King Corp.
Cantrell & Cochrane, Inc.
Carron Manufacturing Co., Inc.
Continental Nut Co.
Cook Distributing Co.
Cook Produce, Inc.
Co-Ordinated Industries, Inc.
Covington Fabrics Corp.
Dean Foods Co.
Dean Foods Products Company
Dean Milk Company, Inc.
Denver Meat Co.

District Hotel Supply, Inc.
Doranne of Califoria d/b/a Embassy Giftwares
Douglas Furniture Corp.
Draper Canning Co., Inc.
Draper-King Cole, Inc.
Dulaney Foods, Inc.
Erie Searing Co.
Falstaff Brewing Company
Fox Deluxe Pizza Co.
Furnitures Plastics, Inc.
Gandy's Dairies, Inc.
Gateway Farms, Inc.
General Brewing Co.
Golden Quality Ice Cream Co.
Grace Brewing Co.
Great Northern Packaging Corp.
Green Bay Foods
Griffin & Brand Sales Agency, Inc.
Grist Mill Co.
Haeger Potteries, Inc.
Huron Packaging Corp.
I. Kaplan, Inc.
Ilikon Corporation
International Frozen Foods, Inc.
Iowa Beef Processors, Inc.
ITT Continental Baking Co.
ITT Gwaltney, Inc.
Jefferson Orchards, Inc.
John Inglis Frozen Foods Co.
Keller Street Development Company
Land O'Lakes, Inc.
Levee Furniture Co.
Liberty Dairy Company
Macomb Pottery Co., Inc.
Maier Brewing Co.
Marathon Enterprises, Inc.

Metro Molding Corporation
Mid-Valley Packing Co., Inc.
Mister B. Greeting Card Co., Inc.
Narragansett Brewing Company
Northland Aluminum Products, Inc.
Nutritional Food Products, Inc.
The Paniplus Co.
Pearl Brewing Company
Pearson Candy Co.
Penthouse Furniture Ltd.
Red Wing Industries, Inc.
Renown, Inc.
Rollins Container, Inc.
Rossville Packing Co., Inc.
S & P Company
Salsburg Meats, Inc.
Sambo's Restaurants, Inc.
Seneca Industries, Inc.
Shell-Tex Fisheries, Ltd.
Sky View Cooling Co.
Snyder-Craft Co., Inc.
Speas Co.
Steak and Ale Restaurants of America
Sunmark, Inc.
Tierra Royal Potteries, Inc.
Town House Furniture Ltd.
Trappe Frozen Foods Corp.
United Foods Services, Inc.
Universal Cooperatives, Inc.
Valley Avocado Sales, Inc.
Valley Farms, Inc.
Valley Plastics, Inc.
Walters Brewing Company
West Publishing Co.
Westside Paper Co.
Williams Manufacturing Co.
Winona Industries
Winter Garden, Inc.
Wittek Golf Supply Co., Inc.

Other defendants named in the original complaint in this litigation were

Alton Box Board Company
Boise Cascade Corporation
Champion International, Inc.
The Chesapeake Corporation of Virginia
Consolidated Packaging Corporation
Container Corporation of America
Corco, Inc.
Crown Zellerbach Corporation
Diamond International Corporation
Dura-Containers, Inc.
Fibre Box Association
Fibreboard Corporation
Georgia-Pacific Corporation
Hoerner Waldorf Corporation
Inland Container Corporation
International Paper Company
Interstate Container Corporation
Longview Fibre Company
MacMillan Bloedel, Inc.
MacMillan Bloedel Containers, Inc.
The Mead Corporation
Menasha Corporation
Olinkraft, Inc.
Owens-Illinois, Inc.
Packaging Corporation of America
Potlatch Corporation
St. Joe Paper Company
St. Regis Paper Company
Southwest Forest Industries, Inc.
Stone Container Corporation
Union Camp Corporation
U.S. Corrugated Fibre-Box Company
Western Kraft East, Inc.
Westvaco Corporation
Weyerhauser Company
Williamette Industries

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported 752 F.2d 137 (5th Cir. 1985), and is included here at Appendix A. The opinion of the district court is reported at 1983-1 Trade Reg. Rep. (CCH) ¶ 65,451 (S.D. Tex. 1983) and is included here at Appendix B.

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JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 4, 1985. A timely petition for rehearing was denied on March 12, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

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CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

In December 1975, a federal grand jury convened in the United States District Court for the Southern District of Texas to investigate charges of price fixing in the corrugated container industry. Before those proceedings were made public, Adams Extract, Inc. filed one of the first of what eventually were more than fifty antitrust actions against thirty-seven corrugated container industry defendants. After consolidating these cases as MDL-310, the Judicial Panel on Multidistrict Litigation transferred them to the Southern District of Texas for coordinated pretrial proceedings.[1]

Almost immediately, the district court entered an order staying discovery. Nevertheless, between March

[1]The district court's jurisdiction in the first instance was predicated upon 15 U.S.C. §§ 1, 15, 26 and 28 U.S.C. § 1337.

1977 and May 1979, plaintiffs settled with twenty-three defendants, including Green Bay, for approximately $300,000,000. During this period plaintiffs ranked each defendant as either a felony indictee, or misdeameanor indictee, or an unindicted company and then assigned to each category a non-negotiable amount against which plaintiffs gave a progressively decreasing discount. Plaintiffs represented to the defendants that each successive settlement within each category would be more expensive than the preceding one, a representation they reinforced by including in the settlement agreements a "Favored Nations Clause" ("Clause"), which provides in pertinent part as follows:

> Plaintiffs agree that, unless present circumstances materially change so that plaintiffs reasonably conclude that the prospect or amount of ultimate recovery from any similarly situated defendant is substantially lessened or reduced, they will not enter into a settlement of the class actions in M.D.L. 310 with any such similarly situated defendant that is more favorable to such defendant . . . without offering similar terms to Settling Defendants hereunder . . .

Green Bay's settlement contract, consisting of the settlement agreement, a promissory note and a letter dated March 5, 1979,[2] provides that, subject to the Clause, Green Bay would pay $5,557,000 to settle the claims against it. Green Bay further agreed to deposit in escrow the promissory note for the principal amount agreed upon, plus interest according to a specified formula. Green Bay's settlement contract, along with several others that also contained the Clause, was preliminarily approved by

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[2]The contractual documents are found at Appendix items D, E and F.

the district court in May 1979 and finally approved in December 1979. On January 25, 1980, the district court entered separate final judgments dismissing with prejudice Green Bay and the other settling defendants. Dissident plaintiffs thereupon appealed to the Court of Appeals for the Fifth Circuit contending that the district court abused its discretion in approving the settlements.

During the months that followed, plaintiffs continued their settlement negotiations with the remaining defendants and began discovery in preparation for the trial, which commenced in June and continued until early September 1980. Before the trial began plaintiffs settled with six other defendants and during the trial it settled with one additional defendant, all for substantially less than the face amount of Green Bay's promissory note. Like Green Bay, none of these seven companies or any of their employees was indicted by the grand jury. Only two of the seven were found by the jury in the civil case to have participated in the conspiracy alleged by plaintiffs.[3]

Although Green Bay had been dismissed with prejudice several months before, plaintiffs, by an *ex parte* application immediately following the class trial, obtained an order from the district court requiring Green Bay show cause why the Clause should not be held inapplicable to the settlement plaintiffs had just concluded with Westvaco. At the subsequent hearing on September 16, 1980, the district court discharged the order on the ground that it lacked jurisdiction because the dismissed portion of

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[3]The jury in the civil case found that Packaging Corporation of American and Southwest Forest Industries participated in the alleged conspiracy. Green Bay was found not to have been a participant.

the action, to which Green Bay was a party, was still on appeal.

Plaintiffs then commenced a separate declaratory judgment action against Green Bay and other defendants having similar Clauses in their settlement contracts. In this action plaintiffs seek a judgment terminating Green Bay's contractual rights to a reduction of the settlement amount and refund of excess monies paid by it. Green Bay's response denied liability, raised its affirmative defenses, counterclaimed for monies already paid in excess of what it owed by reason of the seven lower settlements subsequent to Green Bay's, and demanded a jury trial. This separate action is still pending in the district court.

Following remand by the court of appeals of the portion of MDL-310 that had been appealed, plaintiffs renewed their motion for summary judgment in MDL-310 seeking an order that would terminate Green Bay's rights under the Clause. In November 1982, the district court's law clerk telephoned the attorneys for Green Bay to advise that the court wanted to hear "oral argument" on the favored nations clause matter. At the December hearing the district court gave Green Bay 20 minutes to present oral argument. Although no jury was available and Green Bay received no notice that it had the right to present witnesses, the district court, in its subsequent order of February 2, 1983, granting summary judgment against Green Bay, characterized the hearing as "plenary." *In re Corrugated Container Antitrust Litigation* (*"In re Corrugated"*), 1983-1 Trade Reg. Rep. (CCH) ¶ 65,451 at 70,576. In entering summary judgment against Green Bay, the district court took judicial notice of the criminal

proceedings, to which Green Bay was not a party, *id.*, yet afforded Green Bay "no opportunity . . . to adduce evidence to the contrary." *In re Corrugated,* 752 F.2d 137, 143 (5th Cir. 1985).

Green Bay appealed this decision to the Court of Appeals for the Fifth Circuit. The court of appeals reversed the district court's order granting summary judgment on the ground that Green Bay had no notice that the December hearing had been a plenary one and confirmed Green Bay's position that there existed at least nine disputed issues of material fact relating to the interpretation of the Clause, as follows:

1. Which of seven unindicted companies which settled after Green Bay are "similarly situated" to Green Bay for purposes of the Agreement?
2. Did plaintiffs initially have any reasonable basis to conclude that they had the right to ultimately recover a substantial amount from these unindicted companies?
3. What amount did plaintiffs initially conclude they were entitled to recover from each of these unindicted companies?
4. What time frame does the term "present circumstances" include?
5. Must plaintiffs' reasonable conclusions be based upon the type of objective facts specified in the agreement?
6. Must there be a reasonable causal relationship between the circumstances plaintiffs claim changed and their conclusion that their right to recovery was substantially reduced?
7. Did circumstances occurring after the acquittals in fact enhance rather than reduce plaintiffs'

chance to recover from the seven unindicted companies?

8. Did any event claimed by plaintiffs to be a material change in circumstances actually constitute a change at all, and if so, was it material?

9. By what amount of money did plaintiffs actually conclude their ultimate right to recovery from each similarly situated company was reduced?

In re Corrugated, 752 F.2d at 144.

Despite the presence of these factual issues, the court of appeals ordered the proceedings on remand to be tried to the court without a jury. *Id.* at 145. The court of appeals justified its denial of a jury trial on three grounds: first, the proceeding was begun by a motion and not as a separate civil action; second, judicial administrative efficiency would be better served by eliminating the jury; and third, the motion was one to enforce a judgment, a proceeding it characterized as equitable rather than legal.

From the beginning Green Bay has insisted on its right to a jury trial of the questions raised by the Clause.[4] Green Bay demanded a jury trial in its answer to the original and amended complaints in MDL-310. In response to the order to show cause, Green Bay took the unusual precaution of filing a written objection, the supporting papers to which advised the district court that a jury trial was required. Thereafter, Green Bay demanded

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[4]The statement by the court of appeals that Green Bay did not request a jury "for any of these proceedings," *In re Corrguated*, 752 F.2d at 140, is not accurate. Relevant portions of Green Bay's answers to the two complaints are at Appendix G and H.

a jury trial in its answer to the declaratory judgment action. In response to plaintiffs' motions for summary judgment in MDL-310, Green Bay consistently asserted its right to a jury, a position it repeated during the December hearing.[5]

REASONS FOR GRANTING THE WRIT

This case presents a novel issue of constitutional importance concerning the application of the seventh amendment in proceedings to enforce settlement contracts for the payment of debts disputed in amount. In denying Green Bay the right to present its case to a jury,[6] the court of appeals' action was inconsistent with its responsibility "to protect the constitutional right to trial by

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[5]Such subsequent demands may have been unnecessary, since an initial jury demand runs to all issues, including enforcement of a settlement agreement. *Millner v. Norfolk & Western Railway*, 643 F.2d 1005, 1010 (4th Cir. 1981).

[6]Although the judgment of the court of appeals contemplates further proceedings, the petitioner's Seventh Amendment right is fundamental to the further conduct of this matter because, unless the jury trial issue is reviewed now, Green Bay would be forced to proceed with a non-jury motion hearing in the district court, a subsequent appeal, and another petition to this Court, all at a tremendous cost in judicial and private resources.

jury . . . ." *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962).

The court of appeals recognized that this was a novel issue, since an absence of guiding precedent forced it to rely on state cases and a decision by another court of appeals approving procedures later rejected by this Court. 752 F.2d at 145. Courts that have permitted juries to decide factual disputes arising out of settlement contracts have done so with little or no discussion or analysis of Seventh Amendment principles. See *Press Machinery Corp. v. Smith R.P.M. Corp.*, 727 F.2d 781, 784 (8th Cir. 1984) (*dictum*); *Millner*, 643 F.2d at 1010; *Robbins Tire & Rubber Co. v. United States*, 462 F.2d 684, 686 (5th Cir. 1972) *cert. denied*, 410 U.S. 913; *Winchester Drive-In Theatre, Inc. v. Warner Brothers Pictures Distributing Corp.*, 358 F.2d 432, 433 (9th Cir. 1966). But see *Warner v. Rossignol*, 513 F.2d 678 (1st Cir. 1975). These precedents do not provide a uniform rationale for resolving Seventh Amendment questions in proceedings to enforce ambiguous settlement contracts. Because this Court has not spoken directly on this issue, review is necessary to provide uniform application of the Seventh Amendment in this frequently arising situation. Moreover, the court of appeals not only departed from the accepted and usual course of proceedings to enforce contractual obligations but sanctioned such a departure by the district court. Finally, the decision of the court of appeals undermines the policy of promoting settlements in federal courts because it requires parties to settlement contracts to relinquish important constitutional rights.

A. Under the Standard for Determining a Party's Entitlement to a Jury Trial, This Case Must Be Tried to a Jury.

The Seventh Amendment preserves the right to jury trial in "suits in which *legal* rights were to be ascertained and determined." *Ross v. Bernhard*, 396 U.S. 531, 533 (1970), quoting *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 447 (1830) (emphasis in original). The thrust of the Seventh Amendment is to preserve the right to jury trial as it existed in 1791, although even actions unheard of at common law are entitled to be tried to a jury provided that the proceeding involves rights or remedies of the sort traditionally enforced in an action at law. *Curtis v. Loether*, 415 U.S. 189, 192-94 (1974). The court of appeals confirmed that the relationship between the parties was contractual. 752 F.2d at 142. Indeed, every court of appeals has recognized that settlement agreements are contracts between private parties.[7] The purpose of the hearing ordered by

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[7] *Warner v. Rossignol*, 513 F.2d 678, 682 (1st Cir. 1975); *Sanchez v. Maher*, 560 F.2d 1105, 1108 (2d Cir. 1977); *Plymouth Mutual Life Ins. Co. v. Illinois Mid-Continent Life Ins. Co.*, 378 F.2d 389, 391 (3d Cir. 1967); *United States v. Newport News Shipbuilding & Dry Dock Co.*, 571 F.2d 1283, 1286 (4th Cir. 1978) *cert. denied*, 439 U.S. 875; *Lee v. Hunt*, 631 F.2d 1171, 1173-74 (5th Cir. 1980) *cert. denied*, 454 U.S. 834; *Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479, 487 (6th Cir. 1973); *Air Line Stewards v. Trans World Airlines, Inc.*, 713 F.2d 319, 321 (7th Cir. 1983); *Press Mach. Corp. v. Smith R.P.M. Corp.*, 727 F.2d 781, 784 (8th Cir. 1984); *Dacanay v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978); *Homestake-Sapin Partners v. United States*, 375 F.2d 507, 511 (10th Cir. 1967); *Autera v. Robinson*, 419 F.2d 1197, 1200 (D.C. Cir. 1969).

the court of appeals is to determine the amount Green Bay owes plaintiffs on the settlement contract. A proceeding to collect a debt disputed in amount is and always has been an action at law requiring a jury trial. *Scott v. Neely*, 140 U.S. 106, 110 (1891) (". . . the debt due the complainants was in no respect different from any other debt upon contract; it was the subject of a legal action, only, in which the defendants were entitled to a jury trial in the federal courts"). This principle was reaffirmed in *Dairy Queen*, which also involved a debt due on a contract, with the observation that "it would be difficult to conceive of an action of a more traditionally legal character" than "an action on a debt allegedly due under a contract," 369 U.S. at 477. Likewise, in *Simler v. Conner*, 372 U.S. 221, 223 (1963), a suit by a client for a declaratory judgment of how much he owed his lawyer as a fee, where the client admitted that he owed a "reasonable" fee and asked that the court decide what was reasonable, while the lawyer relied on a contract for a 50% contingent fee, this Court held that the case in its basic character was "a traditionally 'legal' action" and that the Seventh Amendment guaranteed a jury trial.

B. There Exists a Conflict Among the Circuit Courts of Appeal Concerning This Fundamental Constitutional Right.

Many courts have explicitly or implicitly recognized that fact disputes concerning a settlement contract re-

quire a jury trial upon proper demand. Others, however, have reached a contrary result. Compare *Millner v. Norfolk & Western Railway,* 643 F.2d 1005 (4th Cir. 1981) and *Winchester Drive-In Theatre, Inc.,* 358 F.2d 432 (9th Cir. 1966) with *In Re Corrugated,* 752 F.2d 137 (5th Cir. 1984) and *Warner v. Rossignol,* 513 F.2d 678 (1st Cir. 1975). Although *Millner* was an FELA case, the right to a jury trial in cases at common law, "whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. City of New York,* 315 U.S. 752, 753 (1942). Green Bay's constitutional right to a jury trial should not depend upon the circuit to which the Judicial Panel on Multi-District Litigation assigned MDL-310. Nor should there be a "law of the circuit" respecting a right so fundamental as to define the essential character of the judicial process itself.

C. The Decision of the Fifth Circuit is Fundamentally at Odds with the Tests Formulated by The Court for Resolving Seventh Amendment Questions.

The first ground upon which the court of appeals based its denial of Green Bay's right to a jury trial was that the issues arose in the context of a motion for summary judgment and not by a separate suit at common law.[8] 752 F.2d at 144. But a party's right to a jury trial

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[8]Because plaintiffs failed to satisfy the requirements of Fed.R.Civ.P. 60(b), which permits the court to grant a motion for relief from a final judgment in the interest of justice, the appropriate procedure for enforcement of the settlement agreement was by a separate action. *Harman v. Pauley,* 678 F.2d 479, 481-82 (4th Cir. 1982).

does not depend upon the distinction between a motion and a separate action. In *Ross v. Bernhard,* the Court reemphasized the view expressed by Justice Story in *Parsons v. Bedford, Breedlove & Robeson,* 28 U.S. (3 Pet.) 434, 447 (1830), that the Seventh Amendment embraces all proceedings in which legal rights are to be ascertained and determined "whatever may be the peculiar form which they may assume to settle legal rights." 396 U.S. at 533. Because, "[u]nder the [Federal] rules, law and equity are procedurally combined, nothing turns now upon the form of the action or the procedural devices by which the parties happen to come before the court," 396 U.S. at 540, and "there is no longer any procedural obstacle to the assertion of legal rights before juries, however the party may have acquired standing to assert those rights." 396 U.S. at 542.

Since the plaintiffs commenced a separate action seeking a remedy traditionally obtained at common law, *Curtis v. Loether,* 415 U.S. at 192, in addition to proceeding in MDL-310, by motion for summary judgment, to obtain the same remedy, the first ground of the Fifth Circuit's ruling deprives Green Bay of a jury, based not on the right involved or remedy sought, but on the procedural device selected by the plaintiffs. Given the factual issues that exist, plaintiffs would not have been able to avoid a jury trial had they filed a similar motion for summary judgment in the still-pending declaratory judgment action. The "essentially legal nature" of the parties' common law

rights and remedies should not be obscured in either proceeding. *Simler v. Conner*, 372 U.S. at 223.

The second ground upon which the court of appeals based its decision focused on the "need for efficient judicial administration." 752 F.2d at 144. The Seventh Amendment itself confirms that the judgment of the jury is an indispensable element of judicial administration in proceedings at law. *Dimick v. Schiedt*, 293 U.S. at 474, 478 (1935). Moreover, the use of efficiency or convenience justifications in order to deny a jury in legal proceedings has long been rejected as inconsistent with the preservation of Seventh Amendment rights.[9] In *Dairy Queen* this Court reaffirmed the holding of *Scott v. Neely* even though it recognized that it "created considerable inconvenience in that it necessitated two separate trials in the same case whenever that case contained both legal and

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[9]Indeed, the class action procedures of Rule 23 utilized by the plaintiffs demonstrate that considerations of judicial administrative convenience are to be accommodated in a manner consistent with the requirements of the Seventh Amendment. Class actions represent the consolidation of many individual claims for the purpose of judicial administrative convenience, yet it cannot be seriously suggested that the defendants in these proceedings thereby lose their constitutionally protected right to a jury trial. Given the substantial burdens that have been lifted from the shoulders of the courts by Rule 23, it makes no sense to expect that class actions also meet the timetables expected of less complex cases involving individual parties.

equitable claims." 369 U.S. at 471. In *Curtis v. Loether* the Court again rejected this basis with the observation that such "considerations are insufficient to overcome the clear command of the Seventh Amendment." 415 U.S. at 198. Writing for the Court in *Pernell v. Southall Realty,* 416 U.S. 363, 384 (1974), Justice Marshall "reject[ed] the notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial," and recognized the truism that "[s]ome delay . . . is inherent in any fair-minded system of justice." *Id.* at 385. This Court has very recently held that considerations of "economy and efficiency" must yield to the policy reflected in the Federal Arbitration Act. *Dean Witter Reynolds Inc. v. Byrd,* 105 S.Ct. 1238, 1241 (1985). Surely such considerations cannot prevail over the command of the Constitution.

As a final ground for denying Green Bay a jury trial, the court of appeals suggested that "an action to enforce a judgment has been viewed by some courts as an equitable proceeding to be resolved by the courts," although it acknowledged contrary authority. 752 F.2d at 144. However, plaintiffs seek to enforce a promissory note, which is a contract, not a judgment. The effect of the final judgment was only to approve and confirm the merger of plaintiffs' antitrust claims into the ambiguous contract rights at issue.

The error of the court of appeals is even more fundamental because it converts legal rights into equitable ones.

While in certain circumstances legal rights recognized by the Seventh Amendment, such as those arising by contract, may be converted to equitable ones, the conversion must be constitutionally sanctioned. In *Scott v. Neely* the Court held that in the federal courts a state law could not be used to convert a party's legal rights into equitable ones, thereby avoiding the requirement of the Seventh Amendment. While such blending of remedies might be permissible in state courts, it was not in the federal courts because "[t]he Constitution of the United States, in creating and defining the judicial power of the general government, establishes [the] distinction between law and equity. . . ." 140 U.S. at 111, *quoting Bennett v. Butterworth,* 52 U.S. (11 How.) 669, 674 (1851). In *Fleitmann v. Welsbach Street Lighting Co.,* 240 U.S. 27, 29 (1916), Justice Holmes implicitly concluded that legal claims are not converted into equitable issues merely by their presentation to a court of equity. *See also Ross v. Bernhard,* 396 U.S. at 538. After the federal rules merged law and equity, the principle was reaffirmed in *Katchen v. Landy,* 382 U.S. 323, 336 (1966), where the Court held that a creditor's legal claim was converted into an equitable claim to a *pro rata* share of the *res* by virtue of the Bankruptcy Act enacted pursuant to the power given Congress by the Bankruptcy Clause of the Constitution. No similar constitutional provision exists which can convert Green Bay's contractual rights into equitable claims.

Even if plaintiffs are attempting to enforce a judgment, when a party has an adequate remedy at law the rule has historically been precisely the opposite of that stated by the court of appeals. *Dairy Queen,* 369 U.S. at 478. Cases begun at law remain at law; those begun in equity

remain in equity. Thus, in *Knox Co. v. Aspinwall,* 65 U.S. (24 How.) 376, 385 (1861), this Court stated:

> A court of equity is sometimes resorted to as ancillary to a court of law in obtaining satisfaction of its judgments. But no court, having proper jurisdiction and process to compel the satisfaction of its own judgments, can be justified in turning its suitors over to another tribunal to obtain justice.

Since plaintiffs' motion sought and obtained from the district court only a money judgment on a contract for which entire amount Green Bay has posted a supersedeas bond, plaintiffs' remedy at law is clearly adequate. *Schoenthal v. Irving Trust Co.,* 287 U.S. 92, 96 (1932) ("As plaintiff's bill shows that it had a plain, adequate and complete remedy at law, defendants were entitled upon proper application to have the suit transferred and trial by jury.")

The two cases cited by the court of appeals do not support the principle that proceedings in equity may be used to enforce a judgment at law. The first, *Reynolds v. Harrison,* 635 S.W.2d 845 (Tex. App. 1982), concerned the equitable remedy of specific performance. Plaintiffs had commenced a suit in equity and properly sought enforcement of the resulting judgment before the same court. The opinion does not mention, much less discuss, the jury trial issue since the case was never one at law where that issue could arise. Directly on point, however, and contrary to the conclusion of the court of appeals is *Browning v. Holloday,* 620 S.W.2d 611 (Tex. Civ. App. 1981), where the court affirmed the right to a jury trial of factual issues arising out of a contract to settle an action at law with the observation:

> Implicit in this action of the court is a finding that the partes had entered into a final and complete settlement agreement. We need not determine whether this finding was erroneous, because we conclude the court erred in failing to afford a jury trial on a disputed issue of fact, namely, whether there had been a repudiation of the agreement by defendants. If so, plaintiffs were entitled to a jury trial on their underlying cause of action. *If not, plaintiffs could only sue on the agreement, and their remedy would be for breach, also a jury question.*

620 S.W.2d at 613 (emphasis added). *Accord Steenland v. Texas Commerce Bank Nat'l Ass'n,* 648 S.W.2d 387 (Tex. Civ. App. 1983); *Webb v. Webb,* 602 S.W.2d 127 (Tex. Civ. App. 1980). In the second case, *Missouri Pacific Transportation Co. v. George,* 114 F.2d 757 (8th Cir. 1940), *cert. denied,* 312 U.S. 681 (1941), both legal and equitable claims were presented, and the Court of Appeals for the Eighth Circuit followed the then common procedure of trying the equitable claims first—a procedure subsequently rejected by this Court in *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959), and *Dairy Queen.* Subsequently, the Court of Appeals for the Eighth Circuit has stated that the resolution of ambiguous settlement contracts raises jury questions. *Press Machinery Corp. v. Smith R.P.M. Corp.,* 727 F.2d at 784 (dictum).

As part of its "equitable enforcement" rationale, the court of appeals also focused on the origins of the parties' contract by pointing to the involvement of the district court in the settlement approval process. However, the Seventh Amendment does not turn on the origins of the contract involved in the parties' dispute. Moreover, the district court's limited involvement in the settlement approval process pursuant to Fed. R. Civ. P. 23 cannot convert Green Bay's legal rights into equitable ones. When

it authorized this Court to promulgate the federal rules, Congress specifically precluded adoption of any rule that would change a party's substantive rights or abridge a party's Seventh Amendment right to a jury trial. See 28 U.S.C. § 2072; Fed. R. Civ. P. 38, 39. In addition, a district court's involvement in Rule 23 hearings to approve class action settlements is intended as a means of protecting non-party members of a class from unjust and unfair settlements affecting their rights when the class representatives become faint-hearted. *Norman v. McKee,* 431 F.2d 769, 774 (9th Cir. 1970), *cert. denied,* 401 U.S. 912; 7A C. Wright & A Miller, *Federal Practice and Procedure: Civil,* § 1797 at 226. Certainly a procedure intended to preserve the rights of non-parties from their own lawyers cannot deprive a party of its constitutional rights.

D. While Recognizing Green Bay's Right to a Plenary Proceeding, the Decision of the Court of Appeals Effectively Denied Such Procedures to Green Bay.

In its decision, the court of appeals recognized that the factual issues raised by the settlement contract must be resolved in a plenary proceeding. 752 F.2d at 143. Such a proceeding is defined by the Federal Rules of Civil Procedure, which provide "the normal course for beginning, conducting and determining . . . plenary civil trials" in the federal courts. *New Hampshire Fire Insurance Co. v. Scanlon,* 362 U.S. 404, 406 (1960); Fed. R. Civ. P. 1. Summary proceedings, such as those under review in *Scanlon,* are an "exception to our method of administering justice." *Id.* Except in unusual circumstances, which even the court of appeals recognized were not present

here, the procedures set forth in the federal rules must be followed. *Id.*

Nevertheless, the court of appeals permitted plaintiffs to proceed by motion in MDL-310 because the alternatives would delay the conclusion of the class action and "lead the trial court into a procedural maze, for the enforcement proceeding would presumably be treated as a brand new action, with new pleadings, new motions and new pretrial procedures." 752 F.2d at 144-145. However, under any theory of due process, Green Bay is entitled to reasonable notice of plaintiffs' claims against it and the right to be heard on those claims. In the federal courts such notice is provided by pleadings. *Holt v. Virginia,* 381 U.S. 131, 136 (1965) ("[t]he right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues.") By sanctioning a hybrid procedure unknown to the federal rules, the court of appeals has effectively denied Green Bay the benefit of civil process to invoke the district court's jurisdiction pursuant to Fed. R. Civ. P. 4; of the right to receive pleadings, including a complaint, and to answer and file a counterclaim for monies overpaid, pursuant to Fed. R. Civ. P. 7 through 13; of the right to pretrial discovery pursuant to Fed. R. Civ. P. 26 through 27; and a trial by jury pursuant to Fed. R. Civ. P. 38. Such a result, totally at odds with the federal rules, is contrary to the due process requirement "that there be an opportunity to present every available defense." *Lindsey v. Normet,* 405 U.S. 56, 66 (1972).

The court of appeals also departed from accepted judicial procedures when it authorized the district court, in resolving the factual issues identified, to take judicial

notice of adjudicative facts drawn from the criminal and civil proceedings conducted in the antitrust case. Yet neither Green Bay nor any of its present or former employees were parties to the criminal proceedings, and Green Bay had already been finally dismissed from and was contractually prohibited from participating in the civil proceedings when discovery and the trial occurred.

The use of judicial notice of such adjudicative facts is prohibited by Rule 201 of the Federal Rules of Evidence and was condemned in *Ohio Bell Teleph. Co. v. Public Utilities Commission,* 301 U.S. 292, 302 (1937), where the Court stated:

> What was done by the Commission is subject, however, to an objection even deeper. [citations omitted] There has been more than an expansion of the concept of notoriety beyond reasonable limits. From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it created its conclusion. Not only are the facts unknown; there is no way to find them out . . . . This will never do if hearings and appeals are to be more than empty forms.

By endorsing the use of judicial notice of adjudicative facts material to the interpretation of the parties' contract, the court of appeals sanctioned precisely the evil perceived in *Ohio Bell.*

The justifications offered by the court of appeals for these departures from the accepted and usual procedures applicable to civil actions do not withstand scrutiny. The concern for delay has been repeatedly rejected by this Court. In *Fuentes v. Shevin*, 407 U.S. 67, 91 n.22 (1971), (emphasis supplied) the Court stated:

> A prior hearing always imposes some costs in time, effort and expense, and it is often more efficient to dispense with the opportunity for such a hearing. *But these rather ordinary costs cannot outweigh the constitutional right.* [citations omitted] Procedural due process is not intended to promote efficiency or accommodate all possible interests; it is intended to protect the particular interests of the person whose possessions are about to be taken.

The "procedural maze" rationale is equally deficient. Given that the federal rules govern "the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity . . ." Fed. R. Civ. P. 1, it cannot be contended seriously that what is essentially a simple contract action will create procedural difficulties sufficient to justify the denial of the rights provided by the rules of procedure and evidence and guaranteed by the Fifth Amendment. The departures from those rules authorized by the court of appeals conflict with experience that "teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

CONCLUSION

The concept of fundamental fairness embodied in the notion of procedural due process is as important in proceedings to enforce ambiguous settlement contracts as it is in the actions out of which those contracts arise. There can be no question that Green Bay has been and will continue to be denied procedural due process if the court of appeals' remand order is implemented. The denial of a jury trial on plain questions of contract interpretation transcends even these due process considerations, for it is a repudiation of two hundred years of federal jurisprudence preserving that right inviolate.

These, too, are the reasons this Court should grant this petition. It is not only that Green Bay has been wronged; it is also that a constitutional doctrine has now been established by the Court of Appeals for the Fifth Circuit that is repugnant to existing law and that should not be permitted to stand as precedent for others to follow. Nor should the irregular procedures adopted and sanctioned by the courts below be permitted to continue unchecked, not simply because of their unfairness to Green Bay, but also because they undermine the integrity of the judicial process.

For the foregoing reasons, the petitioner Green Bay Packaging Inc., respectfully prays that its Petition for

Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

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APPENDIX A

In re CORRUGATED CONTAINER ANTITRUST LITIGATION,

ADAMS EXTRACT CO., INC., et al.,

Plaintiffs-Appellees,

v.

GREEN BAY PACKAGING, INC.,

Defendant-Appellant.

No. 83-2100.

United States Court of Appeals,
Fifth Circuit.

Feb. 4, 1985.

[West's editorial material omitted.]

Appeal from the United States District Court for the Southern District of Texas.

Before RUBIN, POLITZ, and GARWOOD, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

In this final phase of a massive class action antitrust litigation, begun seven years ago, plaintiffs seek to collect from one of the defendants the amount fixed by the court in a consent decree that incorporated the terms of a settlement agreement between the plaintiffs and that defendant. The defendant resists this effort, contending

that, under a most-favored-nations clause in the agreement, it is entitled to a major reduction in the amount to be paid because of the more favorable settlements negotiated with other defendants who, it alleges, were similarly situated. We hold that the district court retained jurisdiction of such disputes by the terms of its consent decree, despite the inclusion in the decree of a dismissal of the antitrust charges against the defendant with prejudice; the defendant was not entitled to trial of the plaintiffs' motion by jury, and the district judge properly refused to recuse himself, affirming the judgment of the district court on all of these matters. Because the district court adjudicated disputed factual issues without holding an evidentiary hearing, however, we remand for a bench trial on these issues.

The history of the class action out of which this phase of the litigation arises has been fully reported.[1] The suit sought damages on behalf of purchasers of corrugated containers, alleging that 37 defendants had conspired to fix the prices of their products in violation of the Sherman Anti-Trust Act.[2] Nine months later, a federal grand jury returned indictments against fourteen of the 37 civil defendants on similar allegations. The civil proceedings

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1. *See, e.g.,* In re Corrugated Container Antitrust Litigation, 1980-1 Trade Cas. (CCH) ¶ 63,163 (S.D.Tex.1979), *affirmed in part and remanded for additional findings,* 643 F.2d 195, 202-06 (5th Cir.1981), *on remand,* 1981-1 Trade Cas. (CCH) ¶ 64,114 (S.D.Tex.1981), *affirmed after remand,* 659 F.2d 1322 (5th Cir.1981), *cert. denied,* 456 U.S. 998, 1012, 102 S.Ct. 2283, 2308, 73 L.Ed.2d 1294, 1309 (1982); *In re Corrugated Container Antitrust Litigation,* 556 F.Supp. 1117, 1141-1157 (S.D.Tex.1982).

2. 15 U.S.C. § 1 *et seq.*

were stayed until the criminal cases were concluded in April, 1979. Meanwhile, the container-purchaser subclass agreed on settlements with Green Bay Packaging, Inc. and 22 other defendants, many of whom had not been indicted, for a total of $298 million. A number of the corporate and individual defendants in the criminal case entered pleas of nolo contendere before trial, and were sentenced. The jury acquitted all of the defendants who went to trial.

The Green Bay settlement agreement provides for Green Bay to pay $5,557,000 to settle claims against it, subject to a most-favored-nations clause, the full text of which is set forth in the footnote.[3] To meet this obligation,

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3. This clause provides:

> Plaintiffs agree that, unless present circumstances materially change so that plaintiffs reasonably conclude that the prospect or amount of ultimate recovery from any similarly situated defendant is substantially lessened or reduced, they will not enter into a settlement of the class actions in M.D.L. 310 with any such similarly situated defendant that is more favorable to such defendant insofar as it relates to paragraphs 5, 13 and 14 of this Agreement, or any other protective provisions based on federal legislation which effectively overrules *Illinois Brick Co. v. Illinois*, 431 U.S. 720 [97 S.Ct. 2061, 52 L.Ed.2d 707] (1977), and *Hanover Shoe, Inc. v. United Shoes [Shoe] Machinery Corp.*, 392 U.S. 481 [88 S.Ct. 2224, 20 L.Ed.2d 1231] (1968), without offering similar terms to Settling Defendants hereunder; *provided*, however, that, with respect to paragraphs 13 and 14 and said protective provisions, if said Settling Defendant accepts said offer, it agrees to pay such additional amount as necessary to make the aggregate amount paid by Settling Defendant proportionately equal to the aggregate amount paid by such other defendant.

In a letter, class action counsel defined the term "similarly situated defendant" to mean "an unindicted defendant when used in connection with the computation of the [settlement amount]." The letter also states that the only other factor bearing on the definition of this term is a defendant's ability to pay. It contains other provisions elucidating the clause.

Green Bay deposited in escrow a promissory note in the principal amount agreed upon, plus interest according to a specified formula. The agreement provides that, upon approval by the court, a "final order or judgment shall be entered dismissing with prejudice" plaintiffs' claims against Green Bay. The agreement also provides that it becomes effective only after approval by the district court after a hearing. The settlement agreements with the other defendants similarly provided for payment in accordance with the terms of promissory notes issued by each defendant.

The district court gave preliminary approval to the settlements in May, 1979 and final approval in December, 1979. Thereafter, it entered final judgments dismissing each of the settling defendants, including Green Bay, with prejudice. The court found "each of the conditions and events required by [the] settlement with [Green Bay] to be satisfied or occur prior to entry of this final judgment has been satisfied or has occurred," determined "that there was no just reason for delay," and expressly directed "the entry of this judgment of dismissal with prejudice as a final judgment." It retained jurisdiction over Green Bay in a clause reading as follows:

> 5. Without affecting the finality of this judgment in any way, *this court hereby retains continuing jurisdiction over* the Plaintiff Container Purchaser Subclass and *the Settling Defendant with respect to discovery disputes,* as provided in said settlement with Settling Defendant, *and this Court hereby retains continuing jurisdiction over the Settlement Fund described in said settlement, for the purpose of effectuating the settlement* and for the purpose of directing the disposition of the settlement Fund in accordance

with the terms of the settlement, ... (Emphasis supplied.)

The settlement agreement describes Green Bay's promissory note and monies due thereon as the "Fund."

All of the other erstwhile defendants have paid their notes, but Green Bay asserts that the plaintiffs violated the settlement agreement by accepting lower proportionate amounts from other defendants without proper justification. Therefore, while prior orders in this case were on appeal, plaintiffs filed a declaratory judgment action against Green Bay, seeking a judicial determination that Green Bay was obligated to pay the full amount of its note. Shortly after that action was filed, Green Bay refused to make the payments then due. Plaintiffs then sought a summary order from the district court directing Green Bay to comply with its agreement.

Before the hearing on the motion to enforce the agreement, Green Bay had answered the complaint in the declaratory judgment action denying liability, alleging several affirmative defenses and raising a counter-claim for the sum it had already paid in excess of the amount it contended was due. In addition, Green Bay moved that the district judge recuse himself, but the district court denied that motion. Green Bay also served interrogatories and a document-production request. Plaintiffs objected to these discovery efforts and Green Bay filed a motion to compel discovery, but the district court has never ruled on the motion. Neither Green Bay nor the plaintiffs requested a jury for any of these proceedings.

After a hearing at which the district court heard oral argument but no evidence, the district court ordered Green

Bay to comply with the consent decree and to pay the total amount of principal and interest due. The appendix contains no formal notice of that hearing, but Green Bay asserts, and the plaintiffs do not deny, that the parties were notified by the district judge's law clerk in a telephone conversation that the judge wanted to hold a hearing on the plaintiffs' motion.

I.

[1] Green Bay contends that the district court lacked personal jurisdiction over it after the final judgment was entered. The settlement fund, it argues, over which the court retained jurisdiction, was merely the promissory note, not the proceeds of that note.

This interpretation is not consistent with the language of the judgment. The court retained jurisdiction over the settlement fund not only to direct its disposition, which could not, of course, be "allocated" or "distributed" unless it were collected, but also "for the purpose of effectuating the settlement." The court's jurisdiction, therefore, was not limited to distribution of what was collected, if as, or when collected, but extended to whatever was necessary to bring about or accomplish ("effectuate") the settlement. This is also reflected in Paragraph 2 of the agreement which requires the parties to agree to take any steps necessary "by order of court or otherwise" to carry out its terms. In accordance with the terms of the settlement agreement, the note is payable in full on or before March 1, 1981, or ten days after any order of the court authorizing or directing distribution to the class of any settlement funds paid by any other defendant in the action, whichever is earlier. In context, it is plain that the parties and

the district court contemplated that Green Bay would be required to make all the settlement payments before complete and full resolution of all the remaining claims pending in the litigation. Under the circumstances of this case, we construe the district court's judgment to be, in effect, one ordering Green Bay to make the payments called for by the note.

That the judgment also dismissed Green Bay "with prejudice" does not free it from the jurisdiction of the court with regard to the settlement agreement. The judgment terminates Green Bay's liability for charges of antitrust violation "with prejudice," but does not end its obligations under that self-same judgment.

[2] Interpreting the judgment as reserving personal jurisdiction to collect the fund not only conforms to its literal terms, but also makes the judgment implement the court's duty to act as the ultimate guardian of the interests of the class members.[4] In a class action, the district court has a duty to class members to see that any settlement it approves is completed, and not merely to approve a promise, even in the form of a negotiable instrument, to pay the relief to which it has decided class members are entitled. In order for the court to retain personal jurisdiction over Green Bay, therefore, it was not necessary for it to rely

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4. *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978); *Zients v. LaMorte*, 459 F.2d 628, 630 (2d Cir.1972); *Henry v. Merrill Farms*, 94 F.R.D. 730, 733 (N.D.Cal.1982). *See generally* Manual for Complex Litigation, § 1.46 (5th ed. 1982).

only on its inherent power to enforce settlements entered into for the purpose of terminating litigation.[5]

Green Bay cites three cases to support its argument that, when the district court entered the judgment of dismissal, the court lost personal jurisdiction over it save for discovery.[6] None justifies the reliance sought to be placed on it.

In *Fairfax Countywide Citizens v. Fairfax County,*[7] the Fourth Circuit held that the district had the power to vacate a dismissal order that was based on a settlement agreement not mentioned in its order, but it lacked power

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5. *Lee v. Hunt,* 483 F.Supp. 826 (W.D.La.1979), *aff'd,* 631 F.2d 1171, 1173-74 (5th Cir.1980); *cert. denied,* 454 U.S. 834, 102 S.Ct. 133, 70 L.Ed.2d 112 (1981) ("federal courts possess the inherent power to enforce settlements entered into in settlement of litigation"); *Pearson v. Ecological Science Corp.,* 522 F.2d 171 (5th Cir.1975), *cert. denied sub nom., Skydell v. Ecological Science Corp.,* 425 U.S. 912, 96 S.Ct. 1508, 47 L.Ed.2d 762 (1976) (settlement in class action case enforced); *Cia Anon Venezioana de Navegacion v. Harris,* 374 F.2d 33, 35 n. 1 (5th Cir.1967) ("federal courts have held under a great variety of circumstances that a settlement agreement once entered into cannot be repudiated by either party and will be summarily enforced") (collecting cases); *accord Dankese v. Defense Logistics Agency,* 693 F.2d 13 (1st Cir. 1982); *Aro Corp. v. Allied Witan Co.,* 531 F.2d 1368 (6th Cir.), *cert. denied,* 429 U.S. 862, 97 S.Ct. 165, 50 L.Ed.2d 140 (1976); *Howard v. Chris-Craft Corp.,* 562 F.Supp. 307 (N.D. Ill.1982); *cf. Mull v. Marathon Oil Co.,* 658 F.2d 386 (5th Cir. 1981) (out-of-court settlement enforced by motion following dismissal of case).

6. *Fairfax Countrywide Citizens v. Fairfax County,* 571 F.2d 1299 (4th Cir.), *cert. denied,* 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 706 (1978); *U.S. Industries v. Anderson,* 579 F.2d 1227 (10th Cir.1978); *First National Bank v. Marine City, Inc.,* 411 F.2d 674 (3d Cir.1969).

7. 571 F.2d 1299 (4th Cir.), *cert. denied,* 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 706 (1978).

to enforce that agreement because the agreement had not been approved by the court. The court declared, however, that it would have sustained the district court's jurisdiction to enforce the agreement had the settlement been so approved and incorporated into its decree.[8] It is unnecessary for us to approve the result reached by the Fourth Circuit, which may be contrary to Fifth Circuit opinions concerning the inherent power of a district court to enforce an agreement settling itigation pending before the court.[9] Even if the Fourth Circuit doctrine is sound, the rationale of its holding is not applicable here and its dicta approves the course we take.

In *U.S. Industries v. Anderson,*[10] the Tenth Circuit held only that the district court lacked jurisdiction to issue such an order requiring continuance of the payment of disputed stock dividends during the litigation. There had been no court-approved settlement and no court order or judgment of any kind that would have been protected or effectuated by the issuance of the requested injunction. Thus, there was no conceivable basis for the district court's order.

The third case, *First National Bank v. Marine City,*[11] involved the voluntary dismissal of third party defendants

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8. *Id.* at 1303, n. 8.

9. *See, e.g., Massachusetts Cas. Ins. Co. v. Forman,* 469 F.2d 259 (5th Cir.1972); *Cia Anon Venezolana de Navegacion v. Harris,* 374 F.2d 33 (5th Cir.1967). The decision of the district court in *Lee v. Hunt,* 483 F.Supp. 826, which was affirmed by this court, questioned the soundness of the Fourth Circuit's reasoning in *Fairfax County.*

10. 579 F.2d 1227 (10th Cir.1978).

11. 411 F.2d 674 (3d Cir.1969).

following the making of an out-of-court settlement, which had not been supervised or approved by the court.

The proceeding against Green Bay was brought to enforce a settlement contract. But this agreement was more than a bargain struck between two parties; this contract had been approved by the court, had become a part of the consent decree and had merged in that decree.[12] The district court had not merely rubber stamped the contract. Instead, as required by Fed.R.Civ.P. 23, it had held hearings on the fairness of the compromise[13] and then entered a judgment that had the force of law."[14] We find nothing in the authorities cited by Green Bay that alters either the meaning of the court's judgment or the power of the district court to enforce Green Bay's promise to pay. While we do not reach the question of whether every order terminating litigation on the basis of a court-approved settlement necessarily implies that the court has ordered the carrying out of all post-dismissal actions called for by the settlement agreement, or has retained jurisdiction for that purpose, here the district court's action had that effect.

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12. *United States v. City of Miami, Florida,* 664 F.2d 435, 439-40 (5th Cir.1981) (en banc) (Rubin, J., concurring); *United States v. Alaska,* 523 F.2d 1284, 1287 (5th Cir.1975).

13. Fed.R.Civ.P. 23(e) provides:

> (e) Dismissal of Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

14. *United States v. City of Miami, Florida,* 664 F.2d 435, 439 (5th Cir.1981) (en banc) (Rubin, J., concurring).

II.

[3] In its opinion directing Green Bay to comply with the terms of the settlement agreement, the court states that it had a hearing at which it heard argument. It referred to this hearing as a "plenary hearing," and correctly noted "[a] plenary hearing is required when a factual dispute concerning the settlement exists."

There is no doubt that there were material facts in dispute. Indeed, Green Bay suggests that there were nine disputed factual issues, phrasing them as follows:

1. Which of seven unindicted companies which settled after Green Bay are "similarly situated" to Green Bay for purposes of the Agreement?
2. Did plaintiffs initially have any reasonable basis to conclude that they had the right to ultimately recover a substantial amount from these unindicted companies?
3. What amount did plaintiffs initially conclude they were entitled to recover for each of these unindicted companies?
4. What time frame does the term "present circumstances" include?
5. Must plaintiffs' reasonable conclusions be based upon the type of objective facts specified in the agreement?
6. Must there be a reasonable causal relationship between the circumstances plaintiffs claim changed and their conclusion that their right to recovery was substantially reduced?

7. Did circumstances occurring after the acquittals in fact enhance rather than reduce plaintiffs' chance to recover from the seven unindicted companies?

8. Did any event claimed by plaintiffs to be a material change in circumstances actually constitute a change at all, and if so, was it material?

9. By what amount of money did plaintiffs actually conclude their ultimate right to recovery from each similarly situated company was reduced?

Despite the existence of these factual disputes, however, the court did not give the parties notice of a plenary or evidentiary hearing. The court, could, of course, take judicial notice of the lengthy record of prior proceedings and of its knowledge of them. The court afforded no opportunity, however, for Green Bay to adduce evidence to the contrary.

[4] Summary enforcement of a consent judgment, like summary enforcement of a settlement agreement, "is ill-suited to situations presenting complex factual issues related either to the formation or the consummation of the [settlement] contract, which only testimonial exploration in a more plenary proceeding is apt to satisfactorily resolve."[15] Therefore, we conclude that the district court erred in failing to conduct an evidentiary hearing.

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15. *Russell v. Puget Sound Tug & Barge Co.*, 737 F.2d 1510 (9th Cir.1984), *quoting Autera v. Robinson*, 419 F.2d 1197, 1200 (D.C.Cir.1969). *See also Millner v. Norfolk & W.R. Co.*, 643 F.2d 1005, 1009 (4th Cir.1981); *Kukla v. National Distillers Products Company*, 483 F.2d 619, 621 (6th Cir.1973); *Massachusetts Casualty Insurance Co. v. Forman*, 469 F.2d 259, 260 (5th Cir.1972).

III.

[5] The existence of disputed questions of fact does not necessarily entail the right to a jury trial. In the absence of direct precedent, we consider this question, taking into account the terms of the seventh amendment and the need for efficient judicial administration.

The seventh amendment to the Constitution provides: "In suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This creates a historical test for trial by jury, but to apply this standard, the court must do more than simply determine whether the plaintiff has stated a claim for relief in his complaint that would have been triable to a jury when the amendment was adopted in 1791. Instead, the court must consider all of the issues raised in the case in order to determine the method of trial.[16] Pleadings subsequent to the complaint may raise the issues that require a jury trial, even though the complaint sought only equitable relief.[17]

This analysis, although followed in this circuit,[18] does not dispose of the question presented here. The plaintiffs' complaint, alleging violations of the antitrust laws, raised issues properly triable by a jury. Moreover, both

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16. *Ross v. Bernhard*, 396 U.S. 531, 538, 90 S.Ct. 733, 738, 24 L.Ed.2d 729 (1970).

17. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508, 79 S.Ct. 948, 955, 3 L.Ed.2d 988 (1959). *See generally* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2304 (1971).

18. *See, e.g., Guajardo v. Estelle*, 580 F.2d 748 (5th Cir.1978); *Swofford v. B & W, Inc.*, 336 F.2d 406 (5th Cir.1964), *cert. denied*, 379 U.S. 962 85 S.Ct. 653, 13 L.Ed.2d 557 (1965).

the plaintiffs and Green Bay made timely demands for a jury trial on all issues triable by jury. Had the case proceeded to trial, there is no doubt that the parties would have been entitled to have a jury resolve the questions of fact arising from the plaintiff's original anti-trust claims.

But these issues were never tried. Instead, the parties chose to resolve the litigation by means of a settlement agreement that was incorporated into the court's final judgment dismissing the plaintiffs' claims, both at the parties' request and because of the requirements of Fed.R.Civ.P.23, which regulates the conduct of class actions. The parties' original demands for a jury trial thus has no effect, because all of the issues the parties sought to have a jury resolve have been settled.[19] The only remaining issues of fact do not stem from the plaintiffs' original antitrust claims or any defenses to those claims; they arise solely from steps taken to enforce the district court's decree and concern only matters that bear on the meaning of that decree which is in effect a final judgment ordering Green Bay to make the payments called for in the note.

The plaintiffs' motion to enforce the court's judgment cannot be viewed as a separate "suit at common law" that would require a jury trial under the seventh amendment. The plaintiffs did not institute a separate lawsuit to enforce this decree; they simply filed a motion in a seven-year-old class action suit. An action to enforce a judgment has been viewed by some courts as an equitable

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19. *Contra Millner v. Norfolk & Western Ry. Co.*, 643 F.2d 1005 (4th Cir.1981).

proceeding to be resolved by the court, although there is also authority to the contrary.[20]

Finally, although we are aware of, and share, the preference for jury trials implied by the seventh amendment even beyond its literal command,[21] "the Seventh Amendment," as the Supreme Court has said, "was never intended to establish the jury as the exclusive mechanism for fact-finding in civil cases.[22] Many factual issues, collateral to those involved in a suit as defined by the complaint and answer, may arise. Discovery disputes may involve factual issues. Once judgment is entered, efforts to set it aside may depend on factual questions. When a party seeks enforcement of a decree in a class action, the issues raised, whether factual or legal, are incident to the principal dispute and arise only after resolution of that dispute. We see no reason to divorce the power

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20. *Compare Missouri Pac. Transp. Co. v. George,* 114 F.2d 757 (8th Cir.1940) (action to enjoin enforcement of judgment does not entitle plaintiff to jury trial); *and Reynolds v. Harrison,* 635 S.W.2d 845 (Tex.App. Tyler 1982, writ ref'd n.r.e.) (court has inherent authority to enforce its judgment through equitable proceedings) *with Steenland v. Texas Commerce Bank Nat'l Ass'n,* 648 S.W.2d 387 (Tex.App. Tyler 1983); *and Webb v. Webb,* 602 S.W.2d 127 (Tex.Civ.App. Austin 1980) (parties entitled to jury trial to resolve factual questions surrounding judgment).

21. *See Simler v. Conner,* 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed. 2d 691 (1963); *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). *See generally* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2302 (1971).

22. *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442, 460, 97 S.Ct. 1261, 1271, 51 L.Ed.2d 464 (1977).

to interpret and enforce a judgment incorporating and ordering performance of a settlement agreement from the court that rendered it. To do so would not only delay the conclusion of the class action, but would lead the trial court into a procedural maze, for the enforcement proceeding would presumably be treated as a brand new action, with new pleadings, new motions, and new pretrial procedures. Therefore, we find that Green Bay is not entitled to have a jury decide the remaining disputed issues of fact in this litigation.

IV.

[6] Green Bay urges that the district judge should have disqualified himself. This argument, assiduously asserted and stoutly maintained, does not survive even superficial analysis. Green Bay has neither alleged nor proved the slightest "personal bias derived from an extrajudicial source," allegations that are critical to a motion to recuse.[23]

[7] Green Bay argues that, during the course of pretrial conferences on May 16, 1979, and December 16, 1979, and in the district court's opinion of December 21, 1979, the court made "prejudicial" statements in characterizing the most-favored-nations clause and that these statements demonstrated "such pervasive bias and prejudice as to require recusal." On each of the three occasions, the district court made observations on the proceedings or judicial rulings. These comments may suggest early judg-

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23. *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 964 (5th Cir.), *cert. denied*, 449 U.S. 888, 101 S.Ct. 244, 66 L.Ed.2d 114 (1980) (collecting cases).

ment on a legal matter, but they contain no hint of extrajudicial bias or prejudice against a party.[24] To be disqualifying, the alleged bias must be extrajudicial and not based upon in-court rulings.[25]

[8, 9] Green Bay urges that we order the case to be assigned to another judge on remand. The suggestion is unwarrantedly invidious. The district judge has given us no reason to believe that he will not continue to conduct these proceedings fairly or that he will not impartially weigh the evidence that may be submitted. "Although appellate courts do have authority on remand to avoid even the appearance of bias, such mandatory reassignments should be made infrequently and with the greatest reluctance."[26] We are confident that the district judge who has heard the case to this stage is capable of according Green Bay the fair hearing to which it is entitled, and therefore, decline to prejudge his ability by assigning this case to another judge.

For these reasons the case is REMANDED to the district court for an evidentiary hearing on the remaining disputed issues.

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24. *See In re International Business Machines Corp.*, 618 F.2d 923, 929 (2d Cir.1980).

25. *United States v. Haldeman*, 559 F.2d 31, 132 n.297 (D.C. Cir.1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977); *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1052 (5th Cir.1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).

26. *Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1067 (D.C.Cir.1984) (Richey, J., concurring) (citations omitted); *see also Spivey v. Zant*, 683 F.2d 881, 886 n. 6 (5th Cir.1982).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. D. L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION
THIS DOCUMENT RELATES TO
ALL CLASS ACTIONS

[Filed Feb. 2, 1983]

ORDER

This cause comes on to be heard on class plaintiffs' motion to compel defendant Green Bay Packaging, Inc. (Green Bay) to comply with the terms of its settlement agreement. Green Bay has refused to pay any amount in interest or principal since December 1, 1980. Green Bay contends by reason of paragraph sixteen of the settlement agreement, commonly referred to as the "most favored nations clause,"[1] that it is entitled to be offered the same terms of settlement found in the settlement agreements of class plaintiffs with certain other defendants.

There are two issues presented by the parties for the court's determination: first, whether this court has jurisdiction over the parties to the Agreement of Settlement between Container Purchaser Sub-Class and Defendant Green Bay Packaging, Inc., (Green Bay Settlement Agreement) to enforce the settlement once final judgment has been entered; second, whether class plaintiffs' settlements with defendants Southwest Forest Industries, Inc., Packaging Corporation of America, Fibreboard Corporation, Georgia-Pacific Corporation, Potlatch Corporation, Crown

Zellerbach Corporation, and Westvaco Corporation triggered the most favored nations clause in the Green Bay Settlement Agreement.

In evaluating the issues presented by this motion, the court relied on matters of record in this litigation and in the companion criminal cases, *United States v. International Paper Co.*, No. H-78-11, and *United States v. Boise Cascade Corp.*, No. H-78-12 (S.D. Tex.), over which this court presided. The court hereby takes judicial notice of the proceedings in the companion criminal cases which proceedings coincided with the settlements discussed herein. Upon consideration of the numerous memoranda submitted by the parties and the argument presented by counsel at the plenary hearing[2] held on December 2, 1982, the court sets forth the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The question of this court's jurisdiction over the parties and the subject matter to compel a defendant to comply with its settlement agreement arises due to Green Bay's position that it is no longer a party to the class action in M.D.L. No. 310. Green Bay contends that this court does not have jurisdiction since the entry of final judgment dismissing the action pursuant to the execution and approval of the settlement agreement between defendant Green Bay and the plaintiff class. Green Bay is mistaken for several reasons, although only one reason is necessary to point toward the basis for jurisdiction.

This court has continuing jurisdiction over Green Bay and the plaintiffs for the purpose of enforcing compliance

with their settlement agreement for the following reasons: (1) in the Final Judgment of Dismissal with Prejudice of Claims of Container Purchaser Subclass as to Defendant Green Bay Packaging, Inc. (Final Judgment), the court expressly retained jurisdiction in order to effectuate the settlement; (2) by approving the settlement and thus incorporating the agreement into the Final Judgment order, the court has jurisdiction to enforce its own order; and, (3) the court has inherent power to enforce agreements which settle litigation pending before it. These reasons shall be amplified.

First, the court retained jurisdiction over all of the parties and the settlement amounts by express terms in the Final Judgment entered herein on January 25, 1980. The Final Judgment in paragraph five states:

> 5. Without affecting the finality of this judgment in any way, this court hereby retains continuing jurisdiction over the Plaintiff Container Purchaser Subclass and the Settling Defendant with respect to discovery disputes, as provided in said settlement with Settling Defendant, and this Court hereby retains continuing jurisdiction over the settlement Fund described in said settlement, *for the purpose of effectuating the settlement* and for the purpose of directing the disposition of the settlement Fund in accordance with the terms of the settlement, including:
>
> > (a) Allocating and distributing the settlement Fund among various members of the Plaintiff Container Purchaser Subclass and among other persons and entities; and
> >
> > (b) Allowing or disallowing applications for attorneys' fees, costs and expenses, and paying any attorneys' fees, costs and expenses allowed by the Court. (emphasis added)

As evidenced by this language, the court expressly retained jurisdiction over the class plaintiffs, Green Bay and the Settlement Fund for the purposes of: allowing continued discovery to determine the damages which might be owed by defendants adjudged to be coconspirators; entering any orders necessary to effectuate the Green Bay Settlement Agreement; and, directing the distribution of the settlement fund. The Green Bay Settlement Agreement describes the "settlement Fund" to encompass the principal amount to be paid by Green Bay under the agreement, and all interest thereon. Green Bay Settlement Agreement ¶ 5. The promissory note delivered by Green Bay to an escrow agent evidences the debt of Green Bay to class plaintiffs and is property under the continuing jurisdiction of the court. This court retained jurisdiction expressly for the purpose of effectuating the settlement. Jurisdiction was similarly retained over all other defendants and the plaintiff class for the purpose of effectuating their settlements.[3]

The second basis for jurisdiction is predicted upon settlement approval. When a settlement agreement is approved and incorporated into an order of court, the district court possesses jurisdiction to enforce its own order. *In re Chicken Antitrust Litigation,* No. C-74-254A (N.D. Ga. March 28, 1979). *Fairfax Countywide Citizens v. Fairfax County,* 571 F.2d at 1303, n. 8 (4th Cir. 1978). By the duty imposed by Federal Rule of Civil Procedure 23, this court notified the class of the settlement and thereafter approved the settlement on the basis that it was fair, reasonable and adequate. The court actively involved itself in the approval process and could only dismiss the action upon incorporating the settlement agree-

ment and its approval into the Final Judgment order. The Memorandum Opinion and Order of December 21, 1979, by its approval, incorporated the settlement agreement. The Final Judgment of January 25, 1980, was entered upon, and thereby incorporated the Memorandum Opinion and Order. The Final Judgment recites:

> WHEREAS on December 21, 1979, this court filed its Order and Memorandum Opinion finally approving, in all respects, the settlement with Defendant Green Bay Packaging, Inc. (hereinafter the 'Settling Defendant'), which Order and Memorandum Opinion constitutes its findings of fact and conclusions of law with respect to this final judgment and this final judgment is entered thereon.

According to Rule 23, Fed. R. Civ. P., on class actions, and the case law supporting it, this court has what constitutes a fiduciary responsibility to the absent members of the class to approve the settlement agreements if merited; enforce compliance when required; and maintain the settlement fund in satisfactory accounts. *See Manual for Complex Litigation* § 1.46 (5th ed. 1982).

Finally, the third reason points to settled principles of law which illustrate that a court has inherent jurisdiction to enforce compliance with a settlement agreement that settles litigation which was pending before the court. *Lee v. Hunt,* 483 F. Supp. 826 (N.D. La. 1980), *aff'd.* 631 F.2d 1171 (5th Cir. 1980); *Pearson v. Ecological Science Corp.,* 522 F.2d 171 (5th Cir. 1975); *Massachusetts Casualty Insurance Co. v. Forman,* 469 F.2d 259 (5th Cir. 1972); *Crown Life Insurance Co. v. Spring Park Associates,* 623 F.2d 1377 (9th Cir. 1980). An order enforcing a settlement agreement may be made by a court when pending litigation is settled by agreement. Where such

litigation was pending, a court not only has the power, but also the duty to resolve any disputes. *Walter & Cie v. U.S. Fidelity & Guaranty Co.,* 397 F. Supp. 937 (M.D. Pa. 1975).

The foregoing reasons and underlying authorities make it clear that this court has jurisdiction over the class plaintiffs and Green Bay to require the parties to comply with their settlement agreement.

II. THE GREEN BAY SETTLEMENT AGREEMENT

The agreement of settlement between plaintiff Container Purchaser Subclass (class plaintiffs)[4] and defendant Green Bay was effected on March 14, 1979. This court found the settlement to be fair, reasonable and adequate, and, thereafter approved it by its Order of December 21, 1979, Final Judgment of January 25, 1980, and Additional Findings of Fact and Conclusions of Law of June 4, 1981. The United States Court of Appeals for the Fifth Circuit affirmed this approval. *In re Corrugated Container Antitrust Litigation, Adams Extract Co., et al. v. The Chesapeake Corporation of Virginia, et al.,* 659 F.2d 1322 (1981). The Supreme Court denied a petition for certiorari. *CFS Continental Inc. v. Adams Extract Co.,* 102 S.Ct. 2283 (1982). Both the class plaintiffs and Green Bay supported approval of their settlement.

Pursuant to paragraph five of the agreement, defendant Green Bay agreed to pay, in settlement of the class action filed on behalf of the Container Subclass against Green Bay, the sum of $5,557,500. plus interest. Paragraph five further provides that Green Bay shall satisfy its obligation to pay the foregoing amount by depositing

in escrow a promissory note in the principal amount of $5,557,500. which note "shall bear interest, payable quarterly, at the rate that the Texas Commerce Bank of Houston would pay on a ninety (90) day certificate of deposit purchased in the principal amount on the first (1st) day of each quarter commencing March 1, 1979." Paragraph five further specifies:

> Settling Defendant shall pay on or before June 1, 1979, and quarterly thereafter, in cash, in escrows, all the interest accrued on said note. The principal amount of said note, together with all accrued and unpaid interest, shall be payable in full on or before March 1, 1981, or within ten (10) days of any Order of the Court authorizing or requiring distribution of any of the settlement funds paid by any other settling defendant in M.D.L. 310 to members of the class, whichever is earlier.

According to the foregoing provisions of the settlement agreement, Green Bay was required to make a payment of interest on December 1, 1980. The principal amount of the settlement fund was due to be paid on March 1, 1981. These dates passed without the proper payments. Prior to the failure and refusal of Green Bay to make the interest payment and the payment of the principal amount, Green Bay delivered a promissory note to the escrow agent, and, observed its obligations under the monetary terms of the settlement agreement. Green Bay expressly advised the escrow agent that it would not make the interest payment due.[5] Upon default of the December 1, 1980 interest payment, the promissory note made by Green Bay was accelerated and the entire amount of the principal and accrued interest on the promissory note was declared immediately due and payable.[6]

The most favored nations clause found in paragraph sixteen of the Green Bay settlement agreement provides:

> 16. Plaintiffs agree that, unless present circumstances materially change so that plaintiffs reasonably conclude that the prospect or amount of ultimate recovery from any similarly situated defendant is substantially lessened or reduced, they will not enter into a settlement of the class actions in M.D.L. 310 with any such similarly situated defendant that is more favorable to such defendant insofar as it relates to paragraphs 5, 13 and 14 of the Agreement, or any other protective provisions based on federal legislation which effectively overrules *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), and *Hanover Shoe Inc. v. United States Machinery Corp.,* 392 U.S. 481 (1968), without offering similar terms to Settling Defendant hereunder; *provided,* however, that, with respect to paragraphs 13 and 14 and said protective provisions, if said Settling Defendant accepts said offer, it agrees to pay such additional amount as necessary to make the aggregate amount paid by Settling Defendant proportionately equal to the aggregate amount paid by such other defendant.

Only paragraph five, stating the obligation to pay and terms of payment, and paragraph sixteen, specifying the most favored nations clause, are at issue here.

There is no factual dispute over the existence of the settlement agreement, the refusal of Green Bay to make payments under the agreement, or the inclusion of the most favored nations clause in the agreement. The dispute lay in the interpretation and effect of paragraph 16 of the Green Bay settlement agreement, commonly known as the most favored nations clause.

III. MOST FAVORED NATIONS CLAUSE

The sole basis for Green Bay's failure to comply with its obligations under the settlement agreement is its contention that plaintiffs violated the most favored nations clause of the Green Bay Settlement Agreement. Thus, the motion to compel Green Bay to comply with the terms of its settlement agreement presents a narrow question for this court: Did class plaintiffs violate the terms of the most favored nations clause in the Green Bay Settlement Agreement when they settled with certain defendants following the settlement with Green Bay? To determine violation, the court must address a related and more specific question indicated by the most favored nations clause: Did circumstances materially change so that plaintiffs could reasonably conclude that the prospect or amount of ultimate recovery from any similarly situated defendant was substantially lessened or reduced?

Green Bay contends that the settlements reached with Southwest Forest Industries, Inc. (Southwest Forest), Packaging Corporation of America (Packaging Corporation), Fibreboard Corporation (Fibreboard), Potlatch Corporation (Potlatch), Georgia-Pacific Corporation (Georgia-Pacific), Crown Zellerbach Corporation (Crown Zellerbach) and Westvaco Corporation (Westvaco),[7] were each made in violation of the most favored nations clause. The defendants, including Green Bay, the dates of settlement, and amounts paid per market share point are set forth as follows:

	Date of Settlement	Settlement Amount	Market Share	Amount paid per market share pt.
Green Bay Packaging, Inc.	Mar. 14, 1979	5,557,500	1.7	3.25 million per point
Southwest Forest Industries, Inc.	Oct. 5, 1979	2,930,000*	1.38	2.12 million per point
Packaging Corp. of America	Mar. 20, 1980	8,000,000	4.88	1.64 million per point
Fibreboard Corp.			1.83)	
Potlatch Corp.	Apr. 2, 1980	3,000,000	0.17)	0.63 million per point
Georgia-Pacific Corp.			2.72)	
Crown Zellerbach Corp.	June 26,1980	1,000,000	4.57	0.22 million per point
Westvaco Corp.	Sept. 3, 1980	975,000	3.13	0.31 million per point

*Includes 2,490,000 paid to Container Purchaser Subclass and 440,000 paid to Sheet Plant Subclass

Plaintiffs claim that they did not violate the most favored nations clause because certain of the above-named defendants were not similarly situated, and circumstances materially changed to reasonably conclude that the amount of ultimate recovery from all the defendants would be substantially reduced. The court is persuaded by plaintiffs' argument based upon the facts and circumstances in this litigation.

Green Bay relies on the premise that all seven of the above-named defendants are similarly situated with Green

Bay as required by the language in the most favored nations clause. A letter dated March 5, 1979, sent by the chairman of the Plaintiffs' Steering Committee and agreed to by counsel for Green Bay explains the meaning of the term "similarly situated" as used in the most favored nations clause:

> For the purpose of that paragraph, the term "similarly situated defendant" shall be construed to mean an unindicted defendant when used in connection with the computation of the dollar amount arrived at reflected in paragraph 5. Obviously, other factors, such as ability to pay, may result in deeming an unindicted defendant not to be "similarly situated." With respect to the computation of Green Bay's percentage share of the defendants' share of the market, the term "similarly situated defendant" means any other defendant in the above styled litigation.

From this letter, it is understood that one factor which points out a "similarly situated defendant" is that the civil defendant was not indicted. All seven listed by Green Bay are unindicted defendants as is Green Bay. However, "other factors" as recited in the letter, "may result in deeming an unindicted defendant not to be similarly situated." The other factor here is that Green Bay had eleven employees named to be coconspirators by the United States Justice Department in the companion criminal cases resulting from the grand jury investigation. Four of the seven civil defendants named above were not similarly situated with Green Bay. Defendants Fibreboard, Potlatch, Georgia-Pacific and Crown Zellerbach did not have a single employee or former employee named as a coconspirator. Class plaintiffs determined the strengths and weaknesses of their case against individual defendants according to various factors. Plaintiffs predicted a strong-

er case against Green Bay due to the more culpable appearance conveyed by the Justice Department's naming of Green Bay's employees as coconspirators. A grand jury investigation which culminates in targeting a company's employees as coconspirators, albeit without indicting, presents an obvious factor that differentiates the company from those companies and employees not targeted as conspirators.

Turning to the remaining three defendants and in fact all defendants who settled after Green Bay, circumstances materially changed so that plaintiffs could reasonably conclude that the prospect or amount of ultimate recovery from any similarly situated defendant was substantially reduced. The words "present circumstances" are described and elaborated upon in the letter dated March 5, 1978, from the chairman of the Plaintiffs' Steering Committee to counsel for Green Bay and accepted and agreed to by Green Bay:

> As you fully understand, the foregoing representations are designed to assure you that under present circumstances we will not enter into a settlement agreement with any other unindicted defendant on more favorable terms than those agreed to with Green Bay. You, however, fully understand that we must retain the freedom to enter into settlement agreements on non-comparable terms with defendants under different circumstances presented as the events of this litigation unfold. For example, as the Court issues rulings in this case and the criminal case, as evidence unfolds in either case, or as the law governing liability or class action changes, it might become obvious that we have a weaker or stronger case than we now think against Green Bay and the other defendants.

> If circumstances change in such a way to adversely affect the present position of the plaintiffs, then we are free to settle on more favorable terms with another defendant without offering Green Bay similar terms pursuant to paragraph 16 of the Settlement Agreement. In other words, by "present circumstances" in connection with the above representations, we mean simply circumstances currently existing in the posture of this case, status of the law, and extent of our knowledge about the culpability of the various defendants.

Thus, if present circumstances changed as events of the litigation unfolded in the criminal or civil actions, as discovery progressed, or the governing law changed, the plaintiffs were free to settle on terms more favorable to a similarly situated defendant. Several events happened between settlements to cause a change in "present circumstances".

Primarily, the circumstance that materially, in fact dramatically, changed between the time of the Green Bay settlement on March 14, 1979 and the very next settlement on October 5, 1979 (Southwest Forest), occurred in the companion criminal cases. On April 27, 1979, the jury acquitted all of the defendants that went to trial in the criminal action. The basic allegations in the criminal cases were substantially similar to those in the civil cases. However, the civil cases were broader in scope. Although almost all of the 14 companies and 26 individuals indicted pleaded nolo contendere before commencement of the criminal trial, the jury acquittal of the two companies and seven individuals that proceeded to trial had an obvious, significant, and substantial impact on the progress of the settlements in the civil class action. Prior to and during the trial of the criminal cases, twenty-two settlements

were reached with the defendants in the M.D.L. No. 310 class action. These agreements provided for the aggregate payment of approximately $298,000,000. Among the settlements was one reached with defendant Green Bay. After the acquittals, the settlements reached with the seven defendants to which Green Bay refers, provided an aggregate amount of approximately $22 million. Amounts of settlements reached were based on a variety of factors, including the following criteria:

(1) whether or not the defendant was indicted;

(2) the evidence then available against the defendant;

(3) the time of the settlement and the then existing perceived risks of litigation;

(4) the settlement's importance in plaintiffs' overall strategy;

(5) the individual defendant's ability to pay;

(6) the nonmonetary benefit of a particular settlement.

Declaration in Support of Plaintiffs' Motion to Compel Defendant Green Bay Packaging, Inc. to comply with Settlement Agreement at 2, August 13, 1982.

Subsequent to the acquittals, plaintiffs found it impossible to negotiate settlements at amounts comparable to the settlement levels reached just prior to and during the trial of the criminal cases. A group offer made to class plaintiffs by the eleven remaining nonsettling defendants on May 21, 1979, less than one month after the jury returned its verdict of acquittal, consisted of an ag-

gregate amount of $1,800,000. This offer reflects the dramatic reduction in settlement value of the class case that resulted from the verdicts of acquittal in the criminal cases.

As a result of the acquittals in the criminal cases, plaintiffs reasonably concluded that the prospect or amount of ultimate recovery from the nonsettling defendants was substantially lessened and reduced. This conclusion follows from the fact that the United States Justice Department, with all of its resources, failed to convince a jury that there existed a price-fixing conspiracy involving corrugated containers and sheets among the defendants who went to trial and their coconspirators. The jury's acquittals in the criminal cases made evident the risk that plaintiffs might fail to prove its case against the remaining defendants.

Even though there exists a different standard of proof in civil cases, the failure of the Justice Department to prove its case presented a harbinger for the plaintiffs in this civil litigation. Settling defendants, including Green Bay, shared this assessment in a statement made in their brief in support of settlement approval: "Settling defendants . . . submit to this court that the settlement value of this case has greatly diminished since the criminal acquitals." Brief of Certain Settling Defendants in Response to Joint Brief for Plaintiff-Appellant Container Purchasers, *In re Corrugated Container Antitrust Litigation, Adams Extract Co., et al. v. The Chesapeake Corporation of Virginia, et al.*, 659 F.2d 1322 (5th Cir. 1981). Consequently, at the time that plaintiffs settled with the postacquittal settling defendants, the circum-

stances were radically different, due to this one event, from those obtaining the time the Green Bay settled.

Other events that occurred after Green Bay settled include: the refusal of nearly 200 witnesses to testify based on Fifth Amendment grounds thereby stonewalling the plaintiffs' efforts to gather evidence; the presentation of the plaintiffs' case in the civil class action trial; and, the Supreme Court's grant of certiorari on Westvaco's contribution appeal. These events contributed to the change of circumstances allowing plaintiffs to reasonably conclude that the prospect or amount of ultimate recovery was reduced.

In one way, Green Bay was more favorably treated than any of the defendants referred to by Green Bay. Green Bay negotiated for and obtained the privilege of deferring payment of the principal amount of its settlement for a period of about two years. The only obligation during that period was to pay interest due on the principal amount at interim dates. Green Bay was permitted to have the use of its money for the entire two-year period. Therefore, its settlement was more favorable than any of the settlements Green Bay claims to have triggered the most favored nations clause.

The factors described above make Green Bay's assertion that the most favored nations clause was triggered by any of the post-acquittal settlements insupportable. Four of the defendants mentioned were never similarly situated with Green Bay because the Justice Department failed to name any of these defendants' employees as co-conspirators, unlike the naming of Green Bay's employees.

In view of the statement made by Green Bay and the other settling defendants in their brief before the Court of Appeals, it is evident that defendants as well as plaintiffs reasonably believed the jury acquittal changed circumstances such that later settlements were affected. None of the post-acquittal settlements triggered the most favored nations clause in the Green Bay Settlement Agreement. The record before this court and the result of the criminal trial clearly suffice to demonstrate the change of circumstances which forced plaintiffs to make later settlements on any terms available. Therefore, Green Bay must comply with the terms of its settlement agreement.

IV. THE PROMISSORY NOTE

The amount due to the class plaintiffs from defendant Green Bay is evidenced by the terms of the Promissory Note made by Green Bay and delivered to the escrow agent.[8] No penalty is provided for the circumstance at hand. The principal amount due is $5,557,500. The interest is calculated at "the rate that the Texas Commerce Bank National Association would pay on a 90-day certificate of deposit purchased in the principal amount on the first day of each quarter commencing March 1, 1979." The interest was paid through 1979 and most of 1980, until, on December 1, 1980, Green Bay ceased making payments. Therefore, Green Bay owes interest on the principal amount at the rate described above for the period September 1, 1980, (payment due on December 1, 1980, for quarter September, October, November, 1980) through the date Green Bay actually pays the total amount of principal and interest due. The escrow agent, Texas Com-

merce Bank, has set forth the rate of interest due according to the rate paid on 90-day certificates of deposit since September 1, 1980 as follows:

Date	Interest Rate
September 1, 1980	10.25%
December 1, 1980	17%
March 1, 1981	15.15%
June 1, 1981	16.25%
September 1, 1981	17.75%
December 1, 1981	11.25%
March 1, 1982	13.875%
June 1, 1982	13.25%
September 1, 1982	10.25%
December 1, 1982	8.625% [8]

The court shall set February 15, 1983, as the date that Green Bay must pay the total amount of principal and interest due. The amount of interest is calculated at $1,812,802.35 due as of November 30, 1982, and $1,377.39 [9] due each day until payment. The amount of interest due on February 15, 1983, totals $1,918,861.38. Therefore, on February 15, 1983, Green Bay is ordered to pay to the escrow agent the total principal and interest amount of $7,476,361.38 due according to the terms of the Green Bay Settlement Agreement. In the event Green Bay fails to pay the amount prescribed by this order on February 15, 1983, then, the court shall conduct a hearing to determine whether Green Bay is in contempt of this order. If a determination is made that Green Bay has willfully disobeyed this court's order and Green Bay is adjudged to be in contempt, then a monetary sanction shall be imposed in the amount of $10,000 per day which shall become due and owing for each day that Green Bay fails to comply with this order, in addition to the interest on the

principal amount that would accrue, until payment of all monies due (principal, interest and monetary sanction amount) are paid.

Further, following the provisions of the Promissory Note, the last paragraph states, "In the event this note is placed in the hands of an attorney for collection after maturity, the undersigned maker agrees to pay an additional amount equal to a reasonable attorneys' fees." The court shall set forth an amount of reasonable attorneys' fees to be paid to the plaintiffs by Green Bay at a later time. Therefore, the court retains jurisdiction over the parties for the purpose of ordering Green Bay to pay such further amounts as shall be due and payable under the terms of the Green Bay Settlement Agreement and the Promissory Note.

ACCORDINGLY, IT IS HEREBY ORDERED for the reasons stated herein,

1. Green Bay is compelled to comply with its settlement agreement made with the plaintiff class and must pay the amount of $7,476,361.38 to Texas Commerce Bank, escrow agent, on February 15, 1983.

2. Jurisdiction is retained over the parties for the purpose of setting forth reasonable attorneys fees to be paid to the plaintiffs by Green Bay for costs pertaining to the collection of the Promissory Note.

DONE this — day of ————, 1983 in Houston, Texas.

/s/ John V. Singleton
UNITED STATES DISTRICT JUDGE

FOOTNOTES

1. A "most favored nations" clause is a term used in international economics and is often inserted in trade treaties. In the Green Bay Settlement Agreement, a most favored nations clause was inserted to prevent class plaintiffs from settling on more favorable terms with a similarly situated defendant, unless circumstances materially changed so that plaintiffs could reasonably conclude that the prospect or amount of ultimate recovery from any similarly situated defendant was substantially lessened or reduced.

2. A plenary hearing is required when a factual dispute concerning the settlement exists. Pearson v. Ecological Science Corp., 522 F.2d 171, 176 (5th Cir. 1975); Massachusetts Casualty Insurance Co. v. Forman, 469 F.2d 259, 260 (5th Cir. 1972).

3. The Final Judgments of Dismissal entered on January 25, 1980, use similar language and apply to: Consolidated Packaging Corp., Champion International Corp./Hoerner Waldorf Corp., Dura-Containers, Inc., Olinkraft, Inc., St. Joe Paper Co., Inland Container Corp., Owens-Illinois, Inc., Container Corporation of America, MacMillan Bloedel, Inc., U. S. Corrugated Fibre Box Co., The Continental Group, Inc., The Chesapeake Corp. of Virginia, Willamette Industries, Longview Fibre Co., Diamond International Corp., Menasha Corp., International Paper Co., Interstate Container Corp., Boise Cascade Corp., St. Regis Paper Co., Union Camp Corp., Weyerhaeuser Co.

The Final Judgment of Dismissal entered on November 19, 1982, applies to defendants Southwest Forest Industries, Inc., Packaging Corporation of America, Fibreboard Corporation, Georgia-Pacific Corporation, Potlatch Corporation, Fibre Box Association, Crown Zellerbach Corp., Alton Box Board Company, Westvaco Corporation, The Flintkote Company, and the Mead Corporation.

This Final Judgment was worded as follows:

> Without affecting the finality of this judgment in any way this Court hereby retains continuing jurisdiction over the class, including the Plaintiff Container Purchaser and Sheet Plant Subclasses, the Settling Defendants and the Settlement Fund for the purpose of effectuating the settlements and for the purpose of directing the disposition of the settlement fund in accordance with the terms of the settlements, ...

4. The Plaintiff Container Purchaser Subclass is defined as follows:

> All persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers, as defined in the Unified and Consolidated Complaint on file herein) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960, to January 25, 1978, except for the members of the Sheet Plant Subclass, as defined and established by this Court's Pretrial Order No. 7, dated December 26, 1978.

5. In a letter dated November 26, 1980, from counsel for Green Bay to Texas Commerce Bank, escrow agent under the Green Bay Settlement Agreement, Green Bay's counsel reiterated his advice to Green Bay that it refuse to make the December 1, 1980, interest payment. Thereafter, Green Bay, in fact, failed to make the payment.

6. Letter dated December 19, 1980, from counsel for Texas Commerce Bank, the escrow agent under the Green Bay Settlement Agreement, to Green Bay Packaging, Inc.

7. In response to a question pointedly asked of Green Bay by the court at the hearing on December 2, 1982, Green Bay named these seven defendants as the object of its

complaint concerning the most favored nations clauses. At various times in previously filed memoranda, Green Bay included three more defendants: Interstate Container Corporation; Consolidated Packaging Corporation; and, Alton Box Board Company. These three defendants entered into settlements for lower amounts based on their ability to pay. The "hardship settlements", were approved by this court and that approval was affirmed. In re Corrugated Container Antitrust Litigation, Adams Extract Co. et al. v. The Chesapeake Corporation of Virginia, et al. 659 F.2d 1322 (5th Cir. 1981). The hardship settling defendants clearly were not similarly situated with Green Bay. Evidently, Green Bay withdraws objections to these settlements and hereafter waives any further objections.

8. Letter dated January 21, 1983, to Judge Singleton from Texas Commerce Bank.

9. Second Supplemental Declaration in Support of Plaintiffs' Motion to Compel Defendant Green Bay Packaging, Inc. to comply with Settlement Agreement, December 14, 1982.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2100

In Re: CORRUGATED CONTAINER ANTITRUST LITIGATION.

ADAMS EXTRACT CO., INC.,
ET AL.,

Plaintiffs-Appellees,

versus

GREEN BAY PACKAGING, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Filed March 12, 1985)

(Opinion 2/4/85, 5 Cir., 198—, —— F.2d——)

(March 12, 1985)

Before RUBIN, POLITZ, and GARWOOD, Circuit Judges.
PER CURIAM:

(√) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition

for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Alvin B. Rubin
United States Circuit Judge

APPENDIX D

IN THE DISTRICT COURT OF
THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION	§	
	§	M.D.L. NO. 310
	§	
THIS DOCUMENT RELATES TO:	§	
ALL ACTIONS EXCEPT	§	
DEAN FOOD COMPANY, ET AL. (C.A. NO. H-78-2004)	§	
DRAPER-KING COLE, INC., ET AL (C.A. NO. H-78-1226)	§	
FRANKLIN CONTAINER CORP., ET AL (C.A. NO. H-78-671)	§	
GREAT NORTHERN PACKAGING CORP., ET AL (C.A. NO. H-78-1452)	§	
IOWA BEEF PROCESSORS, INC., ET AL (C.A. NO. H-78-1263)	§	
ITT CONTINENTAL BAKING CO. (C.A. NO. H-78-376)	§	
SUNMARK, INC. (C.A. NO. H-78-1815)	§	
UNITED FARMERS COOPERATIVE, INC., ET AL (C.A. NO. H-77-2158)	§	
UNITED FOODS, INC., ET AL (C.A. NO. H-78-4)	§	

AGREEMENT OF SETTLEMENT BETWEEN CONTAINER PURCHASER SUB-CLASS AND DEFENDANT GREEN BAY PACKAGING, INC.

WHEREAS, certain plaintiffs are prosecuting MDL No. 310 now pending before the above-entitled Court (hereinafter "the Court") as a class action;

WHEREAS, the Court ruled in its Order filed on September 6, 1978, that these actions may proceed as a class action on behalf of the class as defined in said Order ("the certified class");

WHEREAS, the Court ruled in paragraph 4 of the Pretrial Order No. 7, filed on December 26, 1978, that the certified class shall consist of a Sheet Plant sub-class, as defined in said Order of December 26, 1978, and a Container Purchaser sub-class comprised of the remainder of the members of the certified class;

WHEREAS, plaintiffs alleged that defendant Green Bay Packaging, Inc. (hereinafter "Settling Defendant") was a participant in an unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers and sheets and it has denied material allegations of plaintiffs' complaints and raised affirmative defenses thereto;

WHEREAS, Settling Defendant, denying wrongdoing of any kind whatsoever, has nevertheless agreed to enter into this Agreement of Settlement to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation;

WHEREAS, plaintiffs have conducted investigations into the facts of these cases, reviewed at length and analyzed the grand jury documents produced by the defendants, and the government trial exhibits made available to plaintiffs, and have conducted other formal and informal investigations, and have concluded that a settlement with Settling Defendant in the amount hereinafter set forth is in the best interests of plaintiffs and the Container Purchaser subclass;

NOW, THEREFORE, it is agreed by and among the undersigned that as to the Container Purchaser sub-class, these class actions be settled and compromised with Settling Defendant, upon approval by the Court, after a hearing as provided for herein, without affecting any rights of the Sheet Plant sub-class or any joint and several liability of any non-settling defendant to the Container Purchaser subclass for any of the acts complained of by plaintiffs in any of their complaints, including, but not limited to, acts of Settling Defendant, on the following terms and conditions:

1. The undersigned counsel represent that they are fully authorized to enter into the terms and conditions of, and execute, this Agreement.

2. The undersigned agree to undertake their best efforts, including all steps and efforts contemplated by this Agreement, and any other steps and efforts which may become necessary by order of the Court or otherwise, to effectuate this Agreement and the settlement set forth herein.

3. For the purposes of this Agreement only, the undersigned agree that there shall be designated the following Settlement Class in M.D.L. No. 310:

> All persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers as defined in the Unified and Consolidated Complaint on file herein) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960 to January 25, 1978, except for the members of the Sheet Plant sub-

class as defined and established in Pretrial Order No. 7, dated December 26, 1978.

4. Said Settlement Class shall be represented by the class representatives designated by the Court in its Order dated October 26, 1978, as modified by the Court's Pretrial Order No. 7, dated December 26, 1978, or as may be otherwise ordered by the Court, who have entered into this Agreement.

5. In full and complete settlement of these class actions by the Container Purchaser sub-class against Settling Defendant and subject to the remaining provisions hereof. Settling Defendant shall pay Five Million Five Hundred Fifty-Seven Thousand Five Hundred Dollars ($5,557,500.00), plus interest from the date of the execution of this Agreement, in the manner hereinafter provided. On or before the execution of this Agreement, Settling Defendant shall deposit, in escrow, as described hereinafter, a promissory note in form satisfactory to the Chairman of Plaintiffs' Steering Committee, in the principal amount of Five Million Five Hundred Fifty-Seven Thousand Five Hundred Dollars ($5,557,500.00). Said note shall bear interest, payable quarterly, at the rate that the Texas Commerce Bank of Houston would pay on a ninety (90) day certificate of deposit purchased in the principal amount on the first (1st) day of each quarter commencing March 1, 1979. Settling Defendant shall pay on or before June 1, 1979, and quarterly thereafter, in cash, in escrow, all of the interest accrued on said note. The principal amount of said note, together with all accrued and unpaid interest, shall be payable in full on or before March 1, 1981, or within ten (10) days of any Order of the Court authorizing or requiring distribution of any of the settlement

funds paid by any other settling defendant in M.D.L. No. 310 to members of the class, whichever is earlier. Said amount and the interest thereon shall be referred to hereinafter as the "Fund". Except as otherwise expressly provided herein, Settling Defendant shall not be liable for any costs (including the costs of notice to class members) or attorneys fees, but all such costs and attorneys' fees as approved by the Court shall be paid out of the Fund and interest earned thereon. In the event Settling Defendant requests notice of this Settlement to be sent to members of the class prior to general notice of certification to class members, Settling Defendant will pay the costs of such notice. In the event federal income tax liability is finally assessed against and paid by Settling Defendant as a result of income earned in the Fund, Settling Defendant shall be entitled to reimbursement of such payment from the Fund. Settling Defendant will use its best efforts to resist any such assessment or payment.

6. Settling Defendant agrees, at its cost, to identify all members of the Settlement Class (as described in paragraph 3 hereof) who purchased corrugated containers and sheets from Settling Defendant to the extent that such information is available to Settling Defendant.

7. The promissory note shall be deposited with Texas Commerce Bank of Houston and the Fund shall be invested by Texas Commerce Bank of Houston as escrow agent pursuant to the Escrow Agreement attached hereto and made part hereof. Any interest earned on the Fund shall become and remain a part thereof.

8. The escrow agent and plaintiffs will be reimbursed and indemnified out of the Fund for all costs and

expenses incurred in the administration and distribution of the Fund. Disbursements for such costs and expenses shall be made from time to time only upon the approval of the Court. Settling Defendant shall have no responsibility with respect to the allocation, administration, or distribution of the Fund except as expressly provided herein.

9. No distribution of the Fund shall be made until (i) the Court has approved this Agreement and the settlement set forth herein pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, (ii) the entry of the Court's final order or judgment approving this Agreement and the settlement set forth herein and dismissing with prejudice the claims of the Settlement Class members against Settling Defendant, (iii) the final affirmance on appeal of, or the final dismissal of an appeal from or the expiration (without the filing or noticing of an appeal) of the time to appeal from said final order or judgment, and (iv) an order of the Court allowing such distribution. Subject to the foregoing, (a) distributions from the Fund approved by the Court may be made to pay approved costs and expenses, past and future, incurred by the Settlement Class plaintiffs, or their counsel in these M.D.L. proceedings, (b) such distributions may be made from time to time on an interim basis prior to the time when the remaining balance of the Fund may be distributed to Settlement Class members, and (c) all such interim distributions shall be paid from the Fund only if authorized or approved by and upon the application of the Plaintiffs' Steering Committee and upon approval of the Court.

10. Upon the Court's approval of this Agreement and the settlement set forth herein, pursuant to said Rule

23(e), said final order or judgment shall be entered which shall provide that all claims of the members of the Settlement Class as against Settling Defendant only arising under the antitrust laws of the United States or of any state or other jurisdiction, or any similar statutory or common law, which have been, might have been, are now or could be asserted in these actions in connection with corrugated containers and corrugated sheets or which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or corrugated sheets alleged in the Unified and Consolidated Complaint on file herein shall be dismissed with prejudice; provided, however, that said final order or judgment shall not be entered unless and until the time within which the Settling Defendant may withdraw from or terminate this Agreement and the settlement set forth herein pursuant to the provisions of paragraph 13 has expired (without such withdrawal or termination having taken place).

11. The settlement set forth in this Agreement shall not become effective unless and until this Agreement is approved in M.D.L. No. 310 in all respects by the Court, (including the approval of the Settlement Class, as defined in paragraph 3 hereof), and, in the event that the Court refuses to approve this Agreement or any material part of it, this entire Agreement shall become null and void unless all parties promptly agree to proceed with the settlement as and if modified by the Court. In the event this Agreement becomes null and void for any reason, including, but not limited to, withdrawal by Settling Defendant, the Fund shall be disbursed to Settling Defendant, except that any costs of administering the Fund or the

settlement set forth in this Agreement, exclusive of attorneys' fees, shall first be deducted before the Fund is returned to Settling Defendant. It is expressly understood and agreed that this Settlement Agreement shall remain in full force and effect notwithstanding any revocation or modification by any court of the Court's September 6, 1978, Class Certification Order, or paragraph 4 of the Court's December 26, 1978, Pretrial Order No. 7.

12. The fact of this settlement with the Settling Defendant shall not be construed to affect, in any manner whatsoever, any joint or several liability of any of the nonsettling defendants for the conspiracy and other acts alleged in the complaints, including but not limited to, any acts of Settling Defendant, any putative common law rule or practice, or state or local statute, to the contrary notwithstanding. Claimants upon the Fund prior to participation therein will execute and deliver covenants not to sue Settling Defendant, or any of its officers, directors or employees, under the antitrust laws of the United States or of any State or other jurisdiction, or any similar statutory or common law, asserting claims which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or sheets alleged in the Unified and Consolidated Complaint on file herein, on the checks or claim forms.

13. The parties have agreed that the Settling Defendant may terminate this Agreement if requests for exclusion from the class are made by potential class members in an amount, and in accordance with the terms and conditions set forth in a separate agreement filed with the Court under seal.

14. Consistent with the terms of this agreement and prior to final approval thereof, a portion of the principal of the Fund may, only upon application by the designated representatives of the Sheet Plant subclass as established and defined in the Court's Pretrial Order No. 7, dated December 26, 1978, be allocated to said sub-class to the extent said sub-class establishes to the satisfaction of the Court that such allocation should be made; *provided,* however, that in no event shall the amount allocated to the Sheet Plant sub-class out of the principal of the Fund exceed the lesser of the following amounts: (a) Seven Hundred Twenty-Eight Thousand Thirty-Two Dollars ($728,032.00) or (b) an amount that bears the same ratio to the entire principal of the Fund that the aggregate sales in dollars of corrugated sheets sold by Settling Defendant to the members of the sheet plant sub-class bears to the aggregate sales in dollars of corrugated containers and corrugated sheets by Settling Defendant during 1972-1976, inclusive (*e.g.*, if the total sales of corrugated sheets to members of the sheet plant sub-class during 1972-1976 equals $20,000.00 and the total sales of corrugated containers and sheets sold by the Settling Defendant during 1972-1976 equals One Million Dollars ($1,000,000.00), then only two percent (2%) of the Fund or One Hundred Eleven Thousand One Hundred Fifty Dollars ($111,150.00), at most, may be allocated to the Sheet Plant sub-class). Nothing herein is intended to or shall be construed to:

(a) affect, modify, release or compromise the rights or claims of, or inure to the benefit of, anyone other than the members of the Settlement Class,

except to the extent that any allocation is made by the Court to members of the Sheet Plant sub-class; or

(b) to be a concession by the Settlement Class or Settling Defendant that any portion of the Fund should be allocated to members of the Sheet Plant sub-class; or

(c) to permit any interest earned on the Fund or any portion prior to the Court's determination that an allocation should be made to the Sheet Plant sub-class, to be included in the amount so allocated.

It is expressly agreed that Settling Defendant shall have no right to participate in any Court proceeding involving any dispute between the Settlement Class and the Sheet Plant sub-class over the amount, if any, that should be allocated to the Sheet Plant sub-class and, unless required by the Court or agreed to by both the Settlement Class and the Sheet Plant sub-class, Settling Defendant will not voluntarily assist either party in connection with such dispute, except to provide such information as may be requested by representatives of the Settlement Class to make the calculations specified above. Nevertheless, Settling Defendant agrees to disclose to the Court and to the designated representatives of the Settlement Class prior to such allocation proceedings, if any, any agreement that it might make with the Sheet Plant sub-class to settle all or part of any claims made by said sub-class.

15. Effective upon the execution of this Agreement by the undersigned counsel, Settling Defendant agrees to cooperate fully with the designees of Plaintiffs' Steering Committee in connection with each of the following matters.

(a) Settling Defendant agrees that, notwithstanding the entry of said final order or judgment, pursuant to paragraph 10 hereof, Settling Defendant shall continue to be considered a party defendant in these class actions for the sole purpose of discovery to be conducted pursuant to the Federal Rules of Civil Procedure;

(b) Settling Defendant agrees to retain, pending the final disposition of all class action cases brought on behalf of the Container Purchaser sub-class involved in these MDL proceedings, all documents or other evidence, if any, in its possession, custody or control, or in the possession, custody or control of its attorneys or other agents relating to the subject matter of these MDL proceedings, including but not limited to, copies of transcripts of the proceedings before the United States Grand Jury for the Southern District of Texas in its investigation of the corrugated container industry, interviews by Government attorneys taken in connection with said investigation, interviews of witnesses taken by or on behalf of Settling Defendant, and summaries thereof;

(c) Settling Defendant agrees to promptly deliver or otherwise make readily available to Plaintiffs' Steering Committee, subject to an agreed protective order, the provisions of paragraph 3 of Pretrial Order No. 7 (or as said Order may hereafter be modified by the Court), and the provisions of paragraph 15(d), all documents and other evidence relevant to the claims asserted in the Uni-

fied and Consolidated Complaint in Settling Defendant's possession, custody or control pursuant to requests made by Plaintiffs' Steering Committee.

(d) Nothing in this Agreement shall require defendant to provide any information or documents subject to an attorney work product, attorney client, or Fifth Amendment privilege, or a court order of non-disclosure, nor shall such privileges be deemed waived.

(e) Settling Defendant shall, consistent with Settling Defendant's obligations, identify with particularity the information or documents which are subject to the provisions of paragraph 15(d) and the factual basis for the asserted privilege, to the extent that such identification does not constitute a breach of the asserted privilege.

16. Plaintiffs agree that, unless present circumstances materially change so that plaintiffs reasonably conclude that the prospect or amount of ultimate recovery from any similarly situated defendant is substantially lessened or reduced, they will not enter into a settlement of the class actions in M.D.L. 310 with any such similarly situated defendant that is more favorable to such defendant insofar as it relates to paragraphs 5, 13 and 14 of this Agreement, or any other protective provisions based on federal legislation which effectively overrules *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), and *Hanover Shoe, Inc. v. United Shoes Machinery Corp.,* 392 U.S. 481 (1968), without offering similar terms to Settling Defendant hereunder; *provided,* however, that, with respect to paragraphs 13 and 14 and said protective provisions, if

said Settling Defendant accepts said offer, it agrees to pay such additional amount as necessary to make the aggregate amount paid by Settling Defendant proportionately equal to the aggregate amount paid by such other defendant.

17. This Agreement shall become affective upon its execution by the undersigned counsel as of the 14th day of March, 1979.

STEPHEN D. SUSMAN, Chairman
Plaintiffs' Steering Committee
Mandell & Wright
806 Main Street, 21st Floor
Houston, Texas 77002

VANCE K. OPPERMAN, Vice Chairman
Plaintiffs' Steering Committee
McGovern, Opperman & Paquin
1100 National City Bank Building
510 Marquette Avenue
Minneapolis, Minnesota 55402

BY: /s/ STEPHEN D. SUSMAN
On Behalf of Plaintiffs' Steering Committee (except James Sloan and Granvil Specks) and All Designated Class Representatives of the Container Purchaser Sub-class (except Ilikon Corporation and Sambo's Restaurants, Inc.)

GREEN BAY PACKAGING, INC.

BY: /s/ WAYNE J. ROPER
Gibbs, Roper, Loots & Williams
757 N. Broadway
Milwaukee, Wisconsin 53202

APPENDIX E

PROMISSORY NOTE

$5,557,500.00 Houston, Texas March 14, 1979

For value received, GREEN BAY PACKAGING INC., a Wisconsin corporation, does hereby promise to pay to the order of TEXAS COMMERCE BANK NATIONAL ASSOCIATION, or its assigns, as escrow agent for the members of the Container Purchaser Sub Class in M.D.L. No. 310 (hereinafter "Escrow Agent") at the office of the Texas Commerce Bank National Association at Houston, Texas, the sum of Five Million, Five Hundred Fifty-seven Thousand, Five Hundred and no/100 Dollars ($5,557,500.00).

This note shall bear interest, payable quarterly, at the rate that the Texas Commerce Bank National Association would pay on a 90-day certificate of deposit purchased in the principal amount on the first day of each quarter commencing March 1, 1979. All of the interest accrued on this note shall be payable in cash or Houston Funds to the Escrow Agent on or before June 1, 1979, and quarterly thereafter.

The principal amount of this note, together with all accrued and unpaid interest, shall be payable in full on or before March 1, 1981, or within ten (10) days of any Order of the Court authorizing or requiring distribution of any of the settlement funds paid by and other settling defendant in M.D.L. No. 310 to members of the class, whichever is earlier.

This note may be prepaid in part or in full at any time without penalty.

In the event of failure to pay when due any of the interest accrued on this note, the holder hereof may declare the unpaid principal and accrued interest on this note immediately due and payable.

The maker of this note does hereby waive presentation for payment, notice or non-payment, protest and notice of protest, and does hereby agree to all extensions and renewals of this note, without notice.

In the event this note is placed in the hands of an attorney for collection after maturity, the undersigned maker agrees to pay an additional amount equal to a reasonable attorneys' fee.

GREEN BAY PACKAGING INC.

By: /s/ James F. Kress

President

Attest:

/s/ B.P. Sittarich
Asst. Secretary

[Corporate Seal]

APPENDIX F

MANDELL & WRIGHT
Attorneys and Counselors
Twenty-First Floor, 806 Main Street
Houston, Texas 77002

Stephen D. Susman
Partner

Telephone
(713) 228-1521

March 5, 1979

Mr. Wayne Roper
Gibbs, Roper, Loots & Williams
757 N. Broadway
Milwaukee, Wisconsin 53202

In Re: Corrugated Container
Antitrust Litigation
M.D.L. No. 310

Dear Wayne:

Attached hereto is a proposed Settlement Agreement, ("the Settlement Agreement"), between Green Bay Packaging, Inc. ("Green Bay") and the Container Purchaser sub-class in the above styled litigation, that representatives of Plaintiffs' Steering Committee and counsel for Green Bay have recently worked out. I have represented to you that I have authority from a majority of Plaintiffs' Steering Committee and all but two of the designated class representatives of the Container Purchaser sub-class as to monetary consideration expressed in the Settlement Agreement and you have represented to me that you have authority from Green Bay to such monetary consideration. As to the other provisions in the Settlement Agreement, we have used our best efforts to negotiate terms that we have reason to believe will be acceptable to the Plaintiffs' Steering Committee and the designated and reserve class representatives of the Container Purchaser

sub-class, and you have used your best efforts to negotiate terms that you have reason to believe will be acceptable to Green Bay. You have also agreed that based upon the assumption that all defendants accounted for 72% of the corrugated container and sheet market during 1972-1976, Green Bay accounted for approximately 1.71% of the defendants' share of such market, and we both understand that the total consideration was calculated by multiplying this percentage share of the market by $3,250,000.00 per percentage point. You have also agreed that Green Bay's dollar sales of corrugated sheets accounted for approximately 13.1% of Green Bay's total sales dollars of corrugated containers and sheets during 1973-1976.

This will also confirm our discussion and agreement with respect to the construction of paragraph 16 of the Settlement Agreement. For the purpose of that paragraph, the term "similarly situated defendant" shall be construed to mean an unindicted defendant when used in connection with the computation of the dollar amount arrived at reflected in paragraph 5. Obviously other factors, such as ability to pay, may result in deeming an unindicted defendant not to be "similarly situated." With respect to the computation of Green Bay's percentage share of the defendants' share of the market, the term "similarly situated defendant" means any other defendant in the above styled litigation. Accordingly, paragraph 16 of the Settlement Agreement is construed to mean the following:

First, we have agreed that unless present circumstances materially change so that plaintiffs' reasonably conclude that the prospect or amount of ultimate recovery from any other defendant is substantially lessened or reduced, they will not hereafter enter into a settlement of the class actions in M.D.L. 310 with any other unindicted defendant

that is for a lesser amount of dollars per percentage point than being paid by Settling Defendant under paragraph 5, without refunding to Settling Defendant an amount which will result in Settling Defendant paying the same aggregate amount per percentage point as paid by such other unindicted defendant.

Second, we have agreed that unless present circumstances materially change so that plaintiffs reasonably conclude that the prospect or amount of ultimate recovery from any other defendant is substantially lessened or reduced, they will not hereafter enter into a settlement with any other unindicted defendant containing any provision more favorable to such defendant regarding any option to terminate the settlement or to have applied any other protective provision based on exclusions from the class by potential class members, without offering such provision to Settling Defendant; *provided*, however, that Settling Defendant agrees to pay the same aggregate amount per percentage point paid by such other defendant.

Third, we have agreed that unless present circumstances materially change so that plaintiffs reasonably conclude that the prospect or amount of ultimate recovery from any other defendant is substantially lessened or reduced, they will not hereafter enter into a settlement with any other unindicted defendant containing any provision more favorable to such defendant regarding any allocation of any portion of the proceeds of settlement with such other defendant to the members or the Sheet Plant sub-class, as defined and established in the Court's Pretrial Order No. 7, dated December 26, 1978, insofar as such allocation is determined and calculated in a manner consistent with the provisions of paragraph 14 of the Settlement Agreement,

without offering such provision to Green Bay; *provided,* however, that, if Green Bay accepts such offer, Green Bay agrees to pay the same aggregate amount per percentage point paid by such other unindicted defendant. It is expressly understood that the $728,032.00 figure contained in paragraph 14 of the Settlement Agreement was set at thirteen and one-tenth percent (13.1%) of the Fund based on Green Bay's estimates that its sales of corrugated sheets accounted for thirteen and one-tenth percent (13.1%) of its total sales of corrugated containers and sheets, and that this percentage may vary from defendant to defendant depending on such defendant's representations as to its sales. Accordingly, a larger percentage of any settlement negotiated with any other defendant may be used in computing the amount, if any, which may be allocated to the members of the Sheet Plant sub-class, if the percentage of such defendant's sales of corrugated sheets are proportionately larger than the percentage of Green Bay's sales of corrugated sheets.

Fourth, we have agreed that unless present circumstances materially change so that plaintiffs reasonably conclude that the prospect or amount of ultimate recovery from any other defendant is substantially lessened or reduced, they will not hereafter enter into a settlement with any other unindicted defendant containing any provision more favorable to such defendant regarding any option to terminate the settlement or to have applied any other protective provision more favorable to such other settling defendant regarding federal legislation affecting the rights of direct or indirect purchasers under the federal antitrust laws without offering such provision to Settling Defendant; *provided,* however, that Settling Defendant agrees to pay the same aggregate amount per percentage point paid by such other settling defendant.

Thus, it is understood and agreed by us, that if, under present circumstances, the Container Purchaser sub-class enters into an agreement of settlement with any other unindicted defendant which contains any of the above-described more favorable terms that Green Bay obtain the benefit of such term by paying such additional amounts. For example: If under present circumstances plaintiffs hereafter enter into a settlement agreement with an unindicted defendant which provides for class member "opt-out" rights more favorable to such defendant than those in the Settlement Agreement, and which also provides for protective provisions based on federal legislation which overrules *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), and *Hanover Shoe, Inc. v. United Shoes Machinery Corp.,* 392 U.S. 481 (1968), and which further provides that such other settling defendant shall pay an amount equal to $6,500,000.00 per percentage point of the defendants' share of the market, then Green Bay may obtain the benefits of both such provisions, conditioned upon its agreement to pay an additional $3,250,000.00 per percentage point of Green Bay's share of the defendants' share of the market, or an additional $5,557,500.00.

As you fully understand, the foregoing representations are designed to assure you that under present circumstances we will not enter into a settlement agreement with any other unindicted defendant on more favorable terms than those agreed to with Green Bay. You, however, fully understand that we must retain the freedom to enter into settlement agreements on non-comparable terms with defendants under different circumstances presented as the events of this litigation unfold. For example, as the Court issues rulings in this case and the criminal case, as evidence unfolds in either case, or as the law governing lia-

bility or class action changes, it might become obvious that we have a weaker or stronger case than we now think against Green Bay and the other defendants.

If circumstances change in such a way to adversely affect the present position of the plaintiffs, then we are free to settle on more favorable terms with another defendant without offering Green Bay similar terms pursuant to paragraph 16 of the Settlement Agreement. In other words, by "present circumstances" in connection with the above representations, we mean simply circumstances currently existing in the posture of this case, status of the law, and extent of our knowledge about the culpability of the various defendants.

Finally, we have agreed that the agreement attached hereto will be filed with the Court under seal in order to avoid disclosure of the terms of paragraph 13 thereof to any but the parties hereto and the Court. We will accordingly also execute and file with the Court, not under seal, an agreement identical to that attached hereto except that paragraph 13 hereof shall read: "The parties have agreed that the Settling Defendant may terminate this Agreement if requests for exclusion from the class are made by potential class members in an amount and in accordance with the terms and conditions set forth in a separate agreement filed with the Court under seal."

Sincerely yours,
/s/ Stephen D. Susman, Chairman
Plaintiffs' Steering Committee

SDS/MB

ACCEPTED AND AGREED:
GREEN BAY PACKAGING, INC.

BY: /s/ Wayne Roper

APPENDIX G

Complete copy
With Service List

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re Corrugated Container Antitrust Litigation	
This Document Relates To: ALL ACTIONS IDENTIFIED IN EXHIBIT A HERETO	M.D.L. No. 310

ANSWERS AND OBJECTIONS OF GREEN BAY PACKAGING INC. TO UNIFIED AND CONSOLIDATED COMPLAINT WITH JURY DEMAND

TO THE HONORABLE JUDGE OF SAID COURT:

GREEN BAY PACKAGING INC. (hereinafter referred to as "Defendant"), by its attorneys, hereby answers the Unified and Consolidated Complaint (hereinafter "Unified Complaint"), and makes its affirmative defenses and objections thereto separately for each and every Complaint in each and every civil action identified in Exhibit A attached hereto in which Defendant has been

properly made a party, reserving Defendant's right to remand of any action transferred to this Court for co-ordinated pretrial purposes.

In support hereof, Defendant states and shows to the Court as follows:

AFFIRMATIVE DEFENSES

I.

FIRST DEFENSE

follows:

Defendant's actions have been lawful and plaintiffs

1. Dismissing the Unified Complaint and each and every action against Defendant herein with prejudice;

2. Denying plaintiffs any of the relief sought against Defendant;

3. Determining that this action cannot be maintained as a class action against Defendant pursuant to Rule 23, Federal Rules of Civil Procedure;

4. Determining that the Court wherein the action was brought lacks personal jurisdiction over Defendant or that venue in such district is improper as to those actions so identified in Exhibit A hereto.

5. Granting Defendant such other and further relief as the Court may deem just and proper, including Defendant's attorneys' fees, costs and other expenses.

Dated this 30th day of June, 1978.

Respectfully submitted for
Green Bay Packaging Inc.

By /s/ Wayne J. Roper
Gibbs, Roper, Loots & Williams
757 North Broadway
Milwaukee, Wisconsin 53202

JURY DEMANDS

Defendant demands a jury trial on all issues that are triable by jury as to each complaint answered herein.

Dated this 30th day of June, 1978.

GREEN BAY PACKAGING INC.

By /s/ Wayne J. Roper
Gibbs, Roper, Loots & Williams
757 North Broadway
Milwaukee, Wisconsin 53202

APPENDIX H

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ADAMS EXTRACT CO., INC.,
on behalf of itself and as a representative
of the Container Purchaser of Sub-Class,
and ROLLINS CONTAINER INC., on
behalf of itself and as a representative of
the Sheet Plant Sub-Class,

Plaintiff,

v.

BOISE CASCADE CORPORATION, et al.,

Defendants.

AFFIRMATIVE DEFENSES
ANSWERS AND COUNTERCLAIM

Case No. H-80-2306

JURY TRIAL DEMANDED

COMES NOW the defendant, GREEN BAY PACKAGING INC., by its counsel, and as and for its answer to the complaint alleges and shows as follows:

AFFIRMATIVE DEFENSES

First Defense

The court does not have subject matter jurisdiction of this matter.

Second Defense

Plaintiffs lack standing to bring this action in a representative capacity.

Third Defense

Plaintiffs have failed to join necessary parties to this action, pursuant to Rule 19, Federal Rules of Civil Procedure.

Fourth Defense

Plaintiffs have failed to join necessary parties in order to give the appearance that the jurisdiction of the Court may be based upon diversity of citizenship.

Fifth Defense

The plaintiffs and those whom they purport to represent in this action have breached their obligations to Green Bay under the Settlement Agreement with Green Bay dated on or about March 14, 1979 (hereinafter "Settlement Agreement") which provides at paragraph 16 as follows:

WHEREFORE, Green Bay prays that the Court enter its judgment as follows:

1. Dismissing the plaintiff's Complaint on the merits with prejudice and award costs and expenses of this action to Green Bay.

2. Declaration of the Court that: (A) Green Bay is entitled to repayment and return of all interest paid to date; (B) the promissory note of Green Bay is non-interest bearing by virtue of the terms of class plaintiff's settlements with other defendants, (C) a reduction of the present face amount of the note from $5,557,500, to $555,750 pursuant to the settlement agreement with Westvaco, or to such other amount as the Court finds is in accordance with such other settlement agreements.

Dated: November 21, 1980.

/s/ Wayne J. Roper
William J. French
Gibbs, Roper, Loots & Williams
757 North Broadway
Milwaukee, Wisconsin 53202

Attorney-in-Charge for
Defendant Green Bay Packaging Inc.

JURY DEMAND

Defendant demands a jury trial on all issues that are triable by jury in this action.

Dated ths 21st day of November, 1980.

GREEN BAY PACKAGING INC.

By /s/ WAYNE J. ROPER
WILLIAM J. FRENCH
Gibbs, Roper, Loots & Williams
757 North Broadway
Milwaukee, Wisconsin 53202

FILED
MAY 24 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GREEN BAY PACKAGING, INC.,
Petitioner,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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35 pp

I

QUESTION RESTATED

Whether the court of appeals erred in its interlocutory decision remanding for an evidentiary hearing respondents' post-judgment motion to enforce a consent decree entered to implement a class action settlement without requiring the trial court to impanel a jury.

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NO. 84-1677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GREEN BAY PACKAGING, INC.,
Petitioner,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Respondent class representative plaintiffs Adams Extract Company, et al., respectfully request this Court to deny the Petition for a Writ of Certiorari for the reasons set forth below.[1]

1. This Brief in Opposition is respectfully submitted in behalf of Adams Extract Company and Rollins Container, Inc., two of the plaintiffs designated by the district court below to represent the certified class. In compliance with Rule 28.1 of this Court, respondents note that the plaintiff certified class consists of an estimated 200,000 persons in the United States who purchased corrugated containers or corrugated sheets from the defendants (or their subsidiaries or affiliates) during the period from January 1, 1960, through January 25, 1978.

STATEMENT OF THE CASE

In late 1975, a federal grand jury was convened to investigate possible criminal antitrust violations involving the corrugated container industry.[2] Following the service of grand jury subpoenas on numerous companies, the Government's investigation became, at least by October 1976, a matter of public knowledge. *See, e.g., Wall Street Journal,* October 26, 1976, p. 28. In March of 1977, the first of many private antitrust actions were filed against thirty-seven corrugated container manufacturers.

On January 25, 1978, the grand jury returned indictments against fourteen corporate and twenty-six individual defendants. The indictments charged that beginning sometime prior to 1960, and continuing to the date of the indictments, a conspiracy had operated to fix the prices of corrugated containers and sheets sold in the area of the United States east of the Rocky Mountains.

On March 20, 1978, plaintiffs, including the respondents herein, filed a single unified complaint on behalf of all purchasers of corrugated containers and sheets. In their answers to the unified complaint, each of the defendants, indicted and unindicted alike, denied any wrongdoing or liability to the plaintiff class. On the same day the unified complaint was filed, plaintiffs moved for class

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2. The history of this multidistrict class action litigation ("M.D.L. 310") and the companion criminal cases is chronicled in several reported decisions. *See, e.g., In re Corrugated Container Antitrust Litigation,* 1980-1 Trade Cas. (CCH) ¶ 63,163 (S.D. Tex. 1979), *aff'd in part and remanded for add'l findings,* 643 F.2d 195, 202-06 (5th Cir. 1981), *on remand,* 1981-1 Trade Cas. (CCH) ¶ 64,114 (S.D. Tex. 1981), *aff'd after remand,* 659 F.2d 1322 (5th Cir. 1981), *cert. denied,* 456 U.S. 998, 1012 (1982); *In re Corrugated Container Antitrust Litigation,* 556 F. Supp. 1117, 1141-57 (S.D. Tex. 1982).

certification. Shortly thereafter, massive document discovery was conducted by the plaintiffs in M.D.L. 310.[3]

In July and August of 1978, the Government identified in its Bill of Particulars forty-eight corporate and hundreds of individual co-conspirators. Among the unindicted co-conspirators named by the Government were petitioner Green Bay Packaging Inc. ("Green Bay") and eleven of its employees.[4]

During the summer of 1978, prior to determination of plaintiffs' pending class certification motion, plaintiffs settled with two defendants, St. Regis and International Paper. On September 6, 1978, after the first two settlements had been reached, the district court entered an order certifying a single plaintiff class in the consolidated litigation. *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D. Tex.), *mandamus denied*, No. 78-3684 (5th Cir. 1978). Following class certification, but prior to the Fifth Circuit's denial of mandamus, plaintiffs negotiated nine more settlements aggregating approximately $68 million.

Between January 5, 1979, after the Fifth Circuit denied defendants' petition for a writ of mandamus, and Janu-

---

3. On April 14, 1978, the district court lifted its prior order staying all discovery proceedings and ordered the defendants to make available to the plaintiffs within 30 days all of the 1.5 to 2 million documents they had previously produced to the grand jury. Further document and written interrogatory discovery was conducted by plaintiffs during the latter part of 1978 and early 1979, and depositions on the merits commenced in the Spring of 1979.

4. In addition to other evidence implicating Green Bay in the alleged price-fixing conspiracy, it may be noted that three Green Bay employees indicated they would take the fifth amendment in M.D.L. 310. *See, e.g., Brinks, Inc. v. United States*, 717 F.2d 700 (2d Cir. 1983) (employee's assertion of fifth amendment gives rise to reasonable inference that employer is guilty in a civil case).

ary 22, 1979, the beginning of the trial of the companion criminal cases, plaintiffs negotiated eleven additional settlements aggregating approximately $219 million. This group, known as the "post-January 5 settlements", included the Green Bay settlement.[5]

The Green Bay settlement obligated Green Bay to pay $5,557,000 to settle all of the claims against it. These claims represented a potential joint and several liability on the part of Green Bay to the class totalling several hundred million dollars. To meet its settlement obligations Green Bay deposited in escrow a promissory note in the principal amount of $5,557,000, plus interest to be paid according to an agreed variable rate. Green Bay's settlement also contained among other provisions a "most favored nations" clause that read, in part:

> Plaintiffs agree that, *unless present circumstances materially change* so that plaintiffs reasonably conclude that the prospect or amount of ultimate recovery from any similarly situated defendant is substantially lessened or reduced, they will not enter into a settlement of the class actions in M.D.L. 310 with any such similarly situated defendant that is more favorable to such defendant . . . without offering similar terms to [Green Bay]; *provided,* however, that . . . , if [Green Bay] accepts said offer, it agrees to pay such additional amount as necessary to make the aggregate amount paid by [Green Bay] proportionately equal to the aggregate amount paid by such other defendant.

---

5. Although the Green Bay settlement was dated March 14, 1979, it was in fact negotiated and agreed to prior to the start of the criminal trial. By the time the criminal trial began, thirty of the forty criminal defendants had pleaded *nolo contendere.*

See In re Corrugated Container Antitrust Litigation, 752 F.2d 137, 139, n.3 (5th Cir. Feb. 4, 1985) (emphasis added).[6]

Circumstances materially changed shortly after the settlement was signed. On April 27, 1979, following only three hours of deliberation, the jury in the companion criminal cases acquitted all ten defendants that went to trial. In the aftermath of the acquittals in the criminal cases, plaintiffs were able to negotiate settlements with eight additional defendants totalling approximately $21 million, an amount proportionately less than many of the prior settlements.[7]

---

6. Virtually all of the other contemporaneous settlements contained a "most favored nations" clause in identical language. Green Bay and the class plaintiffs signed a letter agreement elucidating the clause. The letter agreement stated, in part:

> As you [Green Bay] fully understand, the foregoing representations are designed to assure you that under present circumstances we [the class plaintiffs] will not enter into a settlement agreement with any other unindicted defendant on more favorable terms than those agreed to with Green Bay. You, however, fully understand that we must retain the freedom to enter into settlement agreements on non-comparable terms with defendants under different circumstances presented as the events of this litigation unfold. *For example, as the Court issues rulings in this case and the criminal case, as evidence unfolds in either case,* or as the law governing liability or class action changes, *it might become obvious that we have a weaker or stronger case than we now think against Green Bay* and the other defendants.
>
> If circumstances change in such a way to adversely affect the present position of the plaintiffs, then we are free to settle on more favorable terms with another defendant without offering Green Bay similar terms. . . .

Green Bay App. at F-5 to -6 (emphasis added).

7. After another year of extensive discovery and trial preparation, and at the conclusion of a four-month trial, the jury returned a special verdict against Mead Corporation, the sole remaining defendant. The jury expressly found that Mead had conspired to fix prices in the corrugated container industry with nineteen of the settling defendants and that the prices of corrugated containers and

The pre- and post-January 5 settlements drew objections from several quarters. A few class members complained the settlements were not large enough; a handful complained the settlements with the container purchasers were too large; the single nonsettling defendant, Mead Corporation, complained that the settlements extinguished its claimed right of contribution against the settling defendants; and the settling defendants argued that final approval of the settlements should await adjudication by this Court of Mead's alleged right to contribution.

In an evidentiary hearing held pursuant to Federal Rule 23(e), the district court considered extensive evidence and argument concerning the reasonableness of the settlements, including the Green Bay settlement. In granting final approval to these settlements, the district court stated that it gave "considerable weight" to the fact of the acquittals.

> In deciding whether to approve settlements on behalf of a class, the judge must determine whether they are fair, reasonable, and adequate. The *Manual for Complex Litigation* suggests that the single most important factor to be considered is the strength of the plaintiffs' case in relation to the amount offered in settlement. *Manual* at 56. *In this respect, the court must give considerable weight to the fact that the trial of those indicted resulted in acquittal for all defendants,* and to the fact that the partial settlements before the court represent a very significant percentage of the total estimated damages to the class.

---

sheets had been artificially inflated by five percent as a result of the defendants' conduct. The jury, however, found for Mead on the issue of fraudulent concealment. *Id.* Thereafter, and prior to entry of a final judgment on the verdict, plaintiffs settled with Mead for $45 million. Green Bay, having previously settled with plaintiffs, was not a participant at the trial and was found by the jury not to have participated in the conspiracy with Mead.

In re Corrugated Container Antitrust Litigation, 1981-1 Trade Cas. (CCH) ¶ 63,163 at 77,790 (S.D. Tex. 1981) (emphasis added).

Green Bay joined a number of other defendants in submitting briefs to the Fifth Circuit defending the district court's judgment approving the settlements. Green Bay and the other settling defendants stated:

> The district court expressly held that the settlements "were negotiated before the evidence was presented and the defendants acquitted in the trial of those indicted; it would be a long, hard and expensive task to achieve equal concessions should the court disapprove these settlements and send the parties back to their negotiations." Pretrial Order No. 31, Memorandum Opinion and Order, p. 13 (Docket No. 1262). *Settling defendants join in this view, and submit to this Court that the settlement value of this case has greatly diminished since the criminal acquittals.***
>
> ** Significantly, settlements concluded since the acquittals have been for amounts (proportionately per market share of defendant) significantly lower than the average of the settlements on appeal in the instant case.

(Defendants' Fifth Circuit Brief at 25 and n.** (emphasis added).

Nevertheless, following the district court's approval of its settlement and the entry of a consent decree thereon, Green Bay refused to make further payments pursuant to its promissory note. Instead, Green Bay contended class plaintiffs had violated the "most favored nations" clause by agreeing to more favorable terms with the defendants who settled after the acquittals.[8] Upon Green

8. Green Bay is the only settling defendant that has persisted in making any claim that the "most favored nations" clause was violated or refused to perform any of its settlement obligations for

Bay's breach of its obligations under the consent decree, plaintiffs sought an order in M.D.L. 310 directing Green Bay to comply with the court-approved settlement and consent decree. The district court granted plaintiffs' motion, and Green Bay appealed.

The principal issue on appeal was whether the district court retained jurisdiction over Green Bay in M.D.L. 310 for purposes of enforcing the settlement. The Fifth Circuit noted that the district court's final judgment approving the settlement, while dismissing Green Bay with prejudice, retained jurisdiction of the settlement fund "for the purpose of effectuating the settlement." 752 F.2d at 140. The Fifth Circuit held that the district court's "consent decree incorporated the terms of [the] settlement agreement" and construed the district court's final judgment and decree entered pursuant to the Green Bay settlement "to be, in effect, one ordering Green Bay to make the payments called for by the note." *Id.* at 141. Thus, the Fifth Circuit concluded:

> While we do not reach the question of whether every order terminating litigation on the basis of a court-approved settlement necessarily implies that *the court has ordered the carrying out of all post-dismissal actions called for by the settlement agreement,* or has retained jurisdiction for that purpose, *here the district court's action had that effect.*

Id. at 142 (emphasis added).

Green Bay does not here seek review of that holding.

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any reason. Green Bay had made all of its required installment payments until late 1980, when plaintiffs, out of an abundance of caution, initiated a declaratory relief action seeking a ruling as to whether any of the subsequent settlements violated the clause. Plaintiffs brought that declaratory relief action prior to any violation of the consent decree by Green Bay.

The second issue on appeal was whether plaintiffs had violated the "most favored nations" clause by negotiating post-acquittal settlements on terms more favorable to other defendants than Green Bay received before the acquittals. Holding that this question could not be resolved summarily, the Fifth Circuit remanded the matter with instructions to the district court to conduct an evidentiary hearing on this issue. *Id.* at 142-43.

Third, the court of appeals affirmed the district court's declining to rescue himself. *Id.* at 145. Green Bay does not here seek review respecting either the second or third holdings of the Fifth Circuit.

In its appellants' brief before the Fifth Circuit, Green Bay devoted four sentences to arguing that it was entitled to a jury trial. Green Bay's Opening Brief at 43. The Fifth Circuit rejected that argument, holding that a post-judgment motion brought to enforce a consent decree is to be resolved by the court. 752 F.2d at 144.

It is this holding that Green Bay now requests this Court to review.

REASONS FOR DENYING THE WRIT

The Petition fails to state any reason for granting certiorari. Rule 17 of this Court provides:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. The following, while neither controlling or fully measuring the court's discretion, indicate the character of reasons which will be considered:
> . . .

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. . . .
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Green Bay has shown no conflict among the circuits, no conflict with the decisions of this Court, no important question of federal law that this Court has not previously decided, and certainly no unusual departure from the normal course of judicial proceedings.

To the contrary, Green Bay has presented a question falling well within the guidelines set by prior decisions of this Court and as to which there is no conflict among the circuits. Moreover, the precise question—whether post-judgment enforcement of a court-ordered class action settlement decree requires the court to resort to a jury for findings of fact—arises so infrequently that it cannot be said the Fifth Circuit has "decided an important question of federal law."

A long line of this Court's decisions—as well as logic and principles of sound judicial administration—establish that a federal court has, as a necessary and inherent adjunct of the judicial power, the ability to enforce its

own orders and decrees without having to resort to a jury for determining fact issues. Green Bay has overlooked the fact that the instant case involves not merely the interpretation of a settlement agreement resolving litigation before the court, but the enforcement of a court-approved consent decree that incorporated the executory provisions of the settlement agreement. In resolving disputes concerning the construction and enforcement of a court-approved consent decree, the parties are not entitled to a jury trial.

Furthermore, petitioner failed to properly demand a jury and therefore would not under any circumstances be entitled to one. And in any event, the issue presented here could arise only in a narrow range of cases. Only rarely, if ever, do disputes arise concerning the supposed need for a jury trial in post-judgment proceedings pertaining to the enforcement of class action consent decrees. Indeed, petitioner has not presented a single other case dealing with this issue, much less the decision of another circuit court disagreeing with the Fifth Circuit's holding in this case. Moreover, the Fifth Circuit's decision is interlocutory, since the matter has been remanded for an evidentiary hearing on the merits. The instant case simply does not meet the standards of Supreme Court Rule 17.

1. This Court's Decisions Make It Clear That a Federal Court Has Power to Construe and Enforce Its Own Orders and Judgments Without Resorting to a Jury Trial

Green Bay has attempted to portray this action as a routine breach of contract case for money damages, thereby entitling it to a jury trial. Green Bay's portrayal, however, totally misconceives the nature of the proceed-

ing below.[9] By attempting to divorce the issue from its procedural context, petitioner has fatally flawed it analysis.

> [I]ssues are not inherently legal or equitable. They are like chameleons which take their color from the surrounding circumstances.

9 C. Wright & A. Miller, Federal Practice and Procedure § 2302, at p. 13 (1971).

Contrary to petitioner's mischaracterization of the issue, plaintiffs here do not merely seek to enforce a contract. Indeed, plaintiffs do not merely seek to enforce a court-approved class action settlement agreement. Rather, plaintiffs have sought an order necessary to effectuate and enforce a court's final judgment and decree that, in effect, incorporated the executory terms of a class action settlement.[10]

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9. Even if the crucial point that the court below was held to be enforcing its own decree is ignored Green Bay's portrayal also overlooks the fact that the proceedings in the district court are more aptly characterized as seeking specific performance of an obligation to pay a contractually stipulated sum, and not as a simple claim for money damages. In the instant case plaintiffs sought, in effect, specific performance of Green Bay's promise to pay its promissory note, as required by the settlement agreement and consent decree. An action for specific performance or for an injunction is equitable only and not triable to a jury. *United States v. Louisiana,* 339 U.S. 699 (1950); *Canister Co. v. Leahy,* 182 F.2d 510 (3rd Cir. 1950), *cert. denied,* 342 U.S. 893 (1951).

A case cited by Green Bay, *Warner v. Rossignol,* 513 F.2d 678 (1st Cir. 1975), for the proposition that a jury is not required in connection with a motion to enforce a settlement agreement actually held as its primary ruling that the motion sought specific performance and was therefore an equitable proceeding. *Id.* at 683.

10. The proceeding in the court below is closely akin to a proceeding under rules 69 or 70 of the Federal Rules of Civil Procedure to execute a judgment. Surely, in proceedings under rules 69 or 70 there is no right to a jury trial of fact issues.

In the order appealed from, the district court did not simply rule on a contract dispute, but instead "ordered Green Bay to comply with [its] consent decree." *In re Corrugated Container Antitrust Litigation,* 752 F.2d 137, 140 (5th Cir. Feb. 4, 1985). This conclusion flows from an analysis of the settlement agreement, the final judgment entered pursuant to the settlement agreement, and the totality of circumstances surrounding both.

The parties submitted the settlement to the court for approval as they were required to do by rule 23(e) of the Federal Rules of Civil Procedure. Under the rule and the express terms of the settlement agreement, the settlement with Green Bay could not be effectuated without the court's approval. Green Bay App. at D-3, D-6 and D-7. In approving a class action settlement, the court acts in a fiduciary capacity as the ultimate guardian of the interests of absent class members. *Beecher v. Able,* 575 F.2d 1010, 1016 (2d Cir. 1978); *Zients v. LaMorte,* 459 F.2d 628, 630 (2d Cir. 1972); *Henry v. Merrill Farms,* 94 F.R.D. 730, 733 (N.D. Cal. 1982). *See generally,* Manual for Complex Litigation § 1.46 (5th Ed. 1982). As the Second Circuit noted in *Beecher v. Able, supra,* a district court has "broad supervisory powers" in the administration of class action cases. 575 F.2d at 1016.

The court preliminarily approved the settlement and directed plaintiffs to notify class members of the proposed settlement and their right to have objections heard.

After an exhaustive review of the evidence, and after considering extensive briefing and argument both in favor of and in opposition to the settlement agreement, the district court gave final approval to the settlements.

When the Fifth Circuit remanded for a further round of briefing and fact-finding, *see In re Corrugated Container Antitrust Litigation,* 643 F.2d 195 (5th Cir. 1981), the district court rendered more than ninety pages of additional findings of fact and conclusions of law. The Fifth Circuit then affirmed all of the settlements, including Green Bay's, as "fair, reasonable and adequate," and this Court denied certiorari. *In re Corrugated Container Antitrust Litigation,* 659 F.2d 1322 (5th Cir. 1981), *cert. denied,* 456 U.S. 998, 1012 (1982).

The Green Bay settlement thus was scrutinized by and received the well-considered approval of the district court and was not disturbed on appeal.

In its settlement agreement, Green Bay expressly promised that it would undertake any steps required by order of the district court necessary to effectuate the settlement. Paragraph 2 of the Green Bay settlement agreement reads as follows:

> 2. *The undersigned agree to undertake* their best efforts, including all steps and efforts contemplated by this Agreement, and *any* other *steps and efforts which may become necessary by order of the Court* or otherwise, *to effectuate this Agreement and the settlement set forth herein.* (Emphasis added).

Green Bay App. at D-3. Furthermore, paragraph 5 of the district court's final judgment provides:

> Without affecting the finality of this judgment in any way, *this Court hereby retains continuing jurisdiction over* the Plaintiff Container Purchaser Subclass and *the Settling Defendant with respect to discovery disputes,* as provided in said settlement with Settling Defendant, *and this Court hereby retains continuing*

> *jurisdiction over the Settlement Fund described in said settlement, for the purpose of effectuating the settlement* and for the purpose of directing the disposition of the settlement Fund in accordance with the terms of the settlement, ...

752 F.2d at 140. (Emphasis in quotation).

When Green Bay refused to pay its promissory note in accordance with its obligations under the court's consent decree, plaintiffs brought a motion to compel Green Bay to comply with that decree. It has never been questioned that a federal court has broad discretion to fashion a remedy to protect and effectuate its own orders and judgments. *See, e.g., Kern v. Huidekoper,* 103 U.S. 494, 514 (1880) (federal court has the power to issue an "auxiliary" injunction in order to effectuate its prior judgment rendered in an action at law); *Terry v. Adams,* 345 U.S. 461, 470 (1953) (court retains the power to enter orders and decrees as are necessary and proper in order to effectuate its judgment); *Mississippi Barge Line Co. v. United States,* 273 F. Supp. 1, 6 (E.D. Mo. 1967), *aff'd sub nom. Osbourne v. Mississippi Valley Barge Line Co.,* 389 U.S. 579 (federal courts have "the inherent and statutory (28 U.S.C. § 1651) power and authority to enter such orders as may be necessary to enforce and effectuate their lawful orders and judgments"); *Wood v. Santa Barbara Chamber of Commerce, Inc.,* 705 F.2d 1515, 1524, *cert. denied,* ____U.S.____, 104 S.Ct. 1446 (1983) (federal court "retains jurisdiction to enforce the judgment it enters," even where the court has long since entered its final judgment); *United States v. Wallace,* 218 F. Supp. 290, 292 (N.D. Ala. 1963) (federal courts have "inherent power to enter such orders as may be necessary to effectuate their lawful decrees and to pre-

vent interference with, and obstruction to, their implementation"); *United States v. City of Detroit*, 476 F. Supp. 512, 520 (1979) (federal court has a "broad range of equitable powers available . . . to enforce and effectuate its orders and judgments"); *United States v. Washington*, 459 F. Supp. 1020, 1115 (D.C. Wash. 1978), *aff'd*, 645 F.2d 749 (9th Cir. 1981) (federal court "has broad discretion to fashion remedies which will protect and effectuate its earlier rulings, the more so when the public interest and the rights of a large group of people are involved").

It is also settled that a motion to enforce a judgment is "the proper method to seek [the] assistance of a federal district court in interpreting its judgment." *Jones v. Cleland*, 515 F. Supp. 212, 213 n.1 (N.D. Ala. 1981). A consent decree is not a mere contract, and this is no mere contract dispute. As this Court declared in *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932): "We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act." *Accord, Interdynamics, Inc. v. Firma Wolf*, 653 F.2d 93, 96 (3rd Cir. 1981). The cases also make it plain "that a party violating a consent decree may be subject to the powers by which a court protects its judgments, including, most notably, the power of contempt under 18 U.S.C. § 401 (1976)." *Id.* at 97.

With this background, the Fifth Circuit in the instant appeal easily determined that plaintiff's motion was not a lawsuit for breach of contract.

> [T]his agreement was more than a bargain struck between two parties; this contract had been approved by the court, had become a part of the consent decree and had merged in that decree.

752 F.2d at 142. Rather, the Fifth Circuit properly considered the instant proceedings to be "a motion to enforce the court's judgment." *Id.* at 144. As the court of appeals noted at the outset of its opinion, in this proceeding "plaintiffs seek to collect from one of the defendants the amount fixed by the Court in a consent decree that incorporates the terms of a settlement agreement between the plaintiffs and that defendant." *Id.* at 139.

Because the proceedings here constitute a motion to have the court enforce its own judgment, it has long been established that no right to a jury trial exists.

> It has always been one of the attributes—*one of the powers necessarily incident to a court of justice—that it should have this power* of vindicating its dignity, of *enforcing its orders,* of protecting itself from insult, *without the necessity of calling upon a jury* to assist it in the exercise of this power. . . . [*C*]*ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose* silence, respect, and decorum in their presence, and *submission to their lawful mandates;* . . .

Eilenbecker v. District Court, 134 U.S. 31, 36 (1890) (emphasis added).

> *A court without the power effectually* to protect itself against the assaults of the lawless, or to *enforce its orders, judgments, or decrees* against the recusant parties before it, *would be a disgrace* to the legislation, and a stigma upon the age which invented it.

In re Debs, 158 U.S. 564, 595 (1895) (emphasis added). This Court has repeatedly recognized, then, the need for a court to have the ability to enforce its own orders, and to do so without resort to another fact-finding body like a jury.

> [T]his is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a *jury* or another court, would operate to deprive the proceeding of half its efficency.

In re Debs, 158 U.S. 564, 595 (1895) (emphasis added).

In *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894), the circuit court had voided section 12 of the Interstate Commerce Act as an unconstitutional extension of judicial power. Section 12 granted the ICC the power to subpoena witnesses and documents. The section further empowered the circuit courts to issue orders requiring compliance with ICC subpoenas.

On appeal to the Supreme Court, defendants argued that the procedure of section 12 denied defendants the right to a jury trial. The Supreme Court, in upholding the statute, rejected defendants' argument. The Court reasoned that a circuit court order requiring compliance with an ICC subpoena constituted "a determination of questions upon which a court of the United States is capable of acting, *and which may be enforced by judicial process.*" 154 U.S. at 489 (emphasis added).

> If there is any reason why [defendants] should not be required to answer the questions put to them, or to produce the books, papers, etc., demanded of them, their rights can be recognized and enforced by the court below. . . .

Id.

The rule that courts may summarily enforce their own orders arises most frequently in the context of contempt proceedings. "As a general proposition,[11] there is no right to trial by jury in a contempt proceeding to punish the violation of an injunction." 9 C. Wright & A. Miller, Federal Practice and Procedure § 2308, at p. 46 (1971); *see Eilenbecker v. District Court*, 134 U.S. 31 (1890). A court enforcing its own orders by contempt proceedings is not executing the criminal laws, but only securing to the parties the rights the court adjudged them entitled to. *In re Debs*, 158 U.S. 564, 595 (1895). Similarly, a court enforcing its own settlement decree, such as the one present here, is not resolving a contract dispute, but securing to the litigants the rights the court adjudged them entitled to receive.

Although the no-jury rule arises most frequently in contempt proceedings, the language and rationale of the cases are by no means so limited. Indeed, the reasoning of the contempt cases applies with equal logic to the instant proceedings in which class plaintiffs have sought simply to compel compliance with the district court's final judgment: the dignity and efficiency of the court system depends on a court's ability to enforce compliance with its own orders without resort to another tribunal like a jury.

The cases cited by Green Bay simply do not support its position. Green Bay's emphasis on *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), and *Beacon Theatres*,

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11. The courts unquestionably have power summarily to enforce compliance with their orders through *civil* contempt proceedings. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). The conditional nature of the sanctions—which ends upon the party's compliance—justifies holding contempt proceedings without a jury. *Id.* at 370-71.

Inc. v. Westover, 359 U.S. 500 (1959), is misplaced, because neither case was concerned with any question regarding the right to jury trial in connection with a proceeding by a court to enforce its own order.

Similarly, for several reasons Green Bay has incorrectly relied on *Millner v. Norfolk & Western Railway,* 643 F.2d 1005 (4th Cir. 1981), and *Winchester Drive-In Theater, Inc. v. Warner Brothers Pictures Distributing Corp.,* 358 F.2d 432 (9th Cir. 1966). In the first place, neither case dealt with the question of whether there was a right to jury trial in a post-judgment proceeding to enforce a consent decree.[12]

Second, Green Bay itself recognizes the overwhelming authority holding that a court may summarily enforce a settlement compromising a case before the court.

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12. The procedural context of *Millner* is a world apart from the present case. *Millner* was an FELA damages action for personal injuries. The defendant employer initially answered denying liability on the merits, and later filed an amended answer raising an affirmative defense that the plaintiff has entered into a settlement agreement thereby releasing his claims against the defendant. *Id.* 643 F.2d at 1006-07. In holding that plaintiff was entitled to a jury trial on this issue, the court merely determined that plaintiff had preserved his right to trial by jury of an affirmative defense raised prior to the trial of his case-in-chief. In the instant proceeding, by contrast, the underlying claims of the plaintiffs were extinguished by the consent decree, and plaintiffs now seek an order enforcing that decree. The other cases cited by petitioner are similarly inapposite. None of the federal cases relied upon by petitioner are concerned with the right to jury trial in connection with post-judgment proceedings brought to enforce a consent decree.

Citations to state cases concerning the right to jury trial are beside the point. As stated in a leading treatise: "It is now clear that federal law determines whether there is a right to jury trial in a case in federal court and that state law is wholly irrelevant." 9 C. Wright & A. Miller, Federal Practice and Procedure § 2303, at p. 24 (1971). The state cases cited are, in any event, distinguishable for the same reasons applicable to the federal cases cited by petitioner.

> Federal courts have held under a great variety of circumstances that a settlement agreement once entered into cannot be repudiated by either party and will be summarily enforced.

Cia Anon Venezolana de Navegacion v. Harris, 374 F.2d 33, 35 (5th Cir. 1967); *accord, Warner v. Rossignol,* 513 F.2d 678, 683-84 (1st Cir. 1975); *Kelly v. Greer,* 365 F.2d 669, 671 (3d Cir. 1966); *All States Investors, Inc. v. Bakers Bond Co.,* 343 F.2d 618, 624 (6th Cir. 1965); *Cummins Diesel Michigan, Inc. v. Falcon,* 305 F.2d 721, 723 (7th Cir. 1962).

Third, neither *Millner* nor *Winchester* disputed the proposition just cited. In fact, *Millner* itself cited *Cia Anon Venezolana* with approval. 643 F.2d at 1009.

Finally, and most important, neither *Millner* nor *Winchester* raised the issue of the court's power to enforce its own orders without resort to a jury. As indicated above, a long line of cases has recognized the need for the federal courts to have the power to determine themselves all issues concerning obedience to their orders.

At only one point in its petition, Pet. at 16-17, does Green Bay appear to recognize that plaintiffs here have moved to enforce the district court's judgment and decree. In response, Green Bay makes a single argument: "Cases begun at law remain at law; those begun in equity remain in equity," citing *Knox Co. v. Aspinwall,* 65 U.S. (24 How.) 376 (1861). *Knox,* however, provides no support for Green Bay's argument and, indeed, supports class plaintiffs' position here.

Knox, decided before the merger of law and equity, stood for the straightforward proposition that a court at

law would not be justified in turning parties over to another tribunal, even though the court at law had entered judgment and another tribunal could supply an adequate remedy. Rather, the Supreme Court held that a court has power "to compel satisfaction of its own judgments," *id.* at 385, whether by issuance of a writ of mandamus—as the court at law had done in *Knox*—or otherwise. Thus, *Knox* supports class plaintiffs position that a court has power to enter all writs and orders necessary to satisfy its own judgments.

In short, none of the cases or authorities support the proposition that a federal court must impanel a jury to decide fact questions in a civil proceeding brought to enforce its prior judgments, decrees or orders. Thus, the jury trial question in the case is neither disputed, nor novel, and presents no issue warranting this Court's review. Moreover, for the reasons stated below, the question is not presented in an appropriately clear context for review in any event.

2. Green Bay, By Making a Limited Jury Demand, Has Not Preserved This Issue for Appeal

Rule 38(c) of the Federal Rules of Civil Procedure provides: "In his [jury] demand a party may specify the issues which he wishes so tried." A party who makes such a limited jury demand is not entitled to a jury trial on issues not specified. Green Bay, by making a limited jury demand, has failed to preserve any claim to a jury trial on issues not specified, including any purported right in post-judgment proceedings.

It is undisputed that Green Bay failed to make a specific jury demand with respect to these settlement

enforcement proceedings in M.D.L. 310.[13] Green Bay, however, argues that its initial jury demand in its answer to plaintiffs' unified complaint preserved the issue. Green Bay is simply wrong.

Green Bay's answer to the unified complaint stated, "Defendant demands a jury trial on all issues that are triable by jury *as to each complaint answered herein.*" Green Bay App. at G-3 (emphasis added). The issues in the unified complaint, however, were never tried; instead, Green Bay and the class plaintiffs chose to compromise those issues. *See In re Corrugated Container Antitrust Litigation,* 752 F.2d 137, 144 (5th Cir. Feb. 4, 1985). "The factual issues presented by the pleadings became irrelevant upon effectuation of the settlement." *Cia Anon Venezolana de Navegacion v. Harris,* 374 F.2d 33, 35 (5th Cir. 1967).

Green Bay's limiting its jury demand was not the result of inadvertence or chance. Rather, Green Bay calculatedly limited its jury demand to serve its own purposes. At the time of Green Bay's answer, plaintiffs had previously filed some fifty-five separate complaints. Green Bay argued it had not properly been made a party in some of those fifty-five cases.

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13. Of course, Green Bay's jury demand in the separate declaratory judgment action filed before Green Bay violated the consent decree could not preserve the issue in M.D.L. 310. Plaintiffs also do not concede Green Bay is entitled to a jury trial in the declaratory relief action. *See* p. 12 n.9 *supra.* In any event, plaintiffs note that the declaratory relief action is hardly an adequate alternative to the instant proceedings, given Green Bay's claim that the district court lacks jurisdiction to decide that action, Green Bay App. at H-1.

Furthermore, Green Bay's "objection" in the show cause proceeding could in no way be construed as a jury demand; and, in any event, the show cause order was discharged.

When plaintiffs filed the unified complaint, which included and superseded all fifty-five actions, Green Bay took the position that the filing of a consolidated complaint could not make Green Bay a proper defendant as to plaintiffs that, according to Green Bay, had failed to make Green Bay a proper party in the superseded individual actions. It was in order to preserve this position that Green Bay phrased its answer the way it did: "Green Bay . . . , hereby answers the Unified and Consolidated Complaint . . . , and makes its affirmative defenses and objections thereto separately for each and every complaint in each and every civil action identified in Exhibit A attached hereto in which defendant has been properly made a party, ..." Green Bay App. at G-1 to -2.

It was also in order to preserve this position that Green Bay limited its jury demand to "all issues that are triable by jury as to *each complaint answered herein.*" Green Bay App. at G-3 (emphasis added). Having intentionally and calculatedly limited its jury demand, Green Bay cannot successfully argue that its jury demand extends to all issues, including post-judgment issues not encompassed by those complaints.

Millner, upon which Green Bay relies, is inapposite. In *Millner* the plaintiff's original jury demand made "no specification of the issues to which his demand ran." 643 F.2d 1010. Here, by contrast, Green Bay requested a jury trial only on the issues in the consolidated complaint. Therefore, even if Green Bay were entitled to a jury—which it is not—it failed to make a proper request for one.

3. The Procedures Approved by the District Court and the Fifth Circuit Afford Green Bay Procedural Due Process

Green Bay contends that somehow the plenary hearing ordered by the Fifth Circuit will deprive Green Bay of alleged constitutional rights. Green Bay based this contention on two arguments, both erroneous.

First, Green Bay argues that the plenary hearing is a "hybrid procedure unknown to the federal rules," Pet. at 20. Green Bay's argument, however, ignores the fact that federal courts may hold evidentiary hearings without a jury to determine motions of all kinds, including motions for class certification, *see* Fed. R. Civ. P. 23(c); *Satterwhite v. City of Greenville,* 578 F.2d 987, 998 (5th Cir. 1978) (en banc), *vacated on other grounds,* 445 U.S. 940 (1980), preliminary injunctions, Fed. R. Civ. P. 65(a), permanent injunctions, Fed. R. Civ. P. 65, motions to dismiss for lack of jurisdiction or improper venue, Fed. R. Civ. P. 12(d), and motions to enforce judgment, *see* pp. 11-21 *supra.* The evidentiary hearing, far from being a "hybrid procedure unknown to the federal rules," represents a fact-finding procedure commonly utilized by federal courts to resolve issues arising in any number of contexts. The evidentiary hearing ordered here does not involve a novel procedure and certainly does not have constitutional implications.

Second, Green Bay faults the Fifth Circuit for noting, 752 F.2d at 143, that the district court could take judicial notice of the extensive record compiled in the *Corrugated Container* litigation. Pet. at 21. Contrary to what Green Bay may say, however, the Fifth Circuit simply author-

ized a procedure well recognized in our judicial system. Federal Rule of Evidence 201 expressly permits a court to take judicial notice of established facts. In particular, the court can take judicial notice of facts contained in the record of related cases and proceedings. *Missionary Baptist Foundation v. Huffman,* 712 F.2d 206, 211 (5th Cir. 1983); *Board of Trustees v. Charley Toppino & Sons,* 514 F.2d 700, 704 (5th Cir. 1975).

Green Bay, overlooking these principles and precedents, apparently fears that it will "not know the particular evidential facts of which the [district court will] take notice and on which it [will create] its conclusion." Pet. at 21. Indeed, rule 201 itself does entitle a party to "an opportunity to be heard as to the propriety of taking judicial notice," Fed. R. Evid. 201(c). Green Bay, however, has raised a purely hypothetical straw man based upon a groundless apprehension of what may occur on remand. No reason exists for speculating that the district court will not comply with rule 201(c). To the contrary, there is every reason to believe that the district court will zealously protect the rights of the litigants, including Green Bay's right to be heard on the propriety of taking judicial notice of any facts. As the Fifth Circuit said:

> The district judge has given us no reason to believe that he will not continue to conduct these proceedings fairly. . . . We are confident that the district judge who has heard the case to this stage is capable of according to Green Bay the fair hearing to which it is entitled, ...

In Re Corrugated Container Antitrust Litigation, 752 F.2d 137, 145 (5th Cir. Feb. 4, 1985).

CONCLUSION

The petition for certiorari raises no issue not already decided by this Court. On many occasions, this Court has reaffirmed the power of federal courts to enforce their own orders, judgments, and decrees without resorting to another fact-finding tribunal like a jury. Whatever purported entitlement Green Bay might have to a jury in a contract dispute clearly does not pertain here, where class plaintiffs seek to enforce the district court's judgment. The district court, having ordered Green Bay to carry out all its post-dismissal obligations under the settlement agreement, may enforce its decree after a nonjury evidentiary hearing. No conflict exists in the decisions of this Court or any other courts on this issue.

The procedure contemplated here is precisely the same as authorized by the Federal Rules in many other contexts, including preliminary injunction and class action settlements.

The unanimous decision of the court of appeals in this case is fully in accord with this Court's decisions concerning the right to jury trial and principles of due process. The petition presents no important question of federal law and demonstrates no reason why this Court's review is either necessary or desirable.

Dated this _____ day of May, 1985.

Respectfully submitted,

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Supreme Court, U.S.
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No. 84-1677

In The

Supreme Court of the United States

October Term, 1984

—o—

In re Corrugated Container Antitrust Litigation

—o—

GREEN BAY PACKAGING INC.,
Petitioner,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

—o—

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

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INTRODUCTION

The significance of the Seventh Amendment issue presented by Green Bay's Petition is apparent from plaintiffs' candid statement that "the proceedings in the district court are more aptly characterized as seeking specific performance of an obligation to pay a contractually stipulated sum, and not as a simple claim for money damages." Brief in Opposition at 12 n. 9. This statement, together with the unsupportable position that this case involves a consent decree, demonstrates that plaintiffs actually seek an injunction to pay a debt. Therefore, the significance of this case goes well beyond the fact that plaintiffs' seek to avoid the rule that equity does not intervene where an adequate remedy at law exists. Ultimately, it is important because the plaintiffs, in seeking to deprive Green Bay of a jury trial, would have this Court affirm the expedient adopted by the court of appeals of defining an action at law to collect on a promissory note as one in equity, a course that this Court has repeatedly rejected in the past. *Scott v. Neely,* 140 U.S. 106, 110 (1891) ("In the federal courts this right [to a jury trial] cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by blending any claim, properly cognizable at law, as a demand for equitable relief in and of the legal action or during its pendency.")

I. The Plaintiffs Are Attempting to Enforce a Settlement Contract for the Payment of a Debt, Not a Consent Decree

Plaintiffs devote much of their Brief in Opposition to depicting the proceeding below as a court enforcing a consent decree it had earlier entered, and remind the

Court of cases holding that there is no right to trial jury in contempt proceedings for violation of an injunction. Petitioner, it is said "totally misconceives the nature of the proceeding below." Brief in Opposition at 11-12.

This is a remarkable rewriting of history. No party or court ever had the slightest thought that a "consent decree" was involved here until the Fifth Circuit, in the decision of which review is now sought, *sua sponte* so characterized it. *In Re Corrugated,* 752 F.2d 137, 139, 142 (5th Cir. 1985). There is nothing that could possibly be regarded as an injunctive order, within the requirements of Fed. R. Civ. P. 65(d). Compare, for example, the proposed consent decree in *Carson v. American Brands, Inc.,* 450 U.S. 79, 85 n.9 (1981). In the imaginary circumstances depicted by plaintiffs, there might well be no right to trial by jury. But there is a right to a trial by jury when, as here, in reality plaintiffs are seeking to collect on a promissory note subject to the terms of an ambiguous settlement agreement. Such a claim is legal, not equitable. *Scott v. Neely,* 140 U.S. 106, 110 (1981). This is plain from the terms of the Settlement Agreement, the attached Promissory Note, Petitioner's Appendix at D-1, and the Final Judgment, Supplemental Appendix A-1, as well as from the treatment these documents have received from the parties and courts below.

The Settlement Agreement contains terms typical of a negotiated contract. In return for the dismissal of a lawsuit, Green Bay agreed to pay an amount of money "subject to" the various terms and conditions set forth in the document, including the Favored Nations Clause. The terms of the contract preclude modification by the

court absent the parties' express agreement. In approving the Settlement Agreement, the district court found that "all of the conditions or events required by the settlement to be satisfied have been satisfied or have occurred," thus confirming that the Clause remained an integral part of the contract at the time of final approval. The Final Judgment [Supplemental Appendix A-1 attached hereto] also confirms that the issues arise out of the parties' ambiguous settlement contract, as it specifically refers to and its entry was dependent upon the parties' settlement. It contains no language implementing the Settlement Agreement or ordering compliance with it, nor could it have, since subsequent lower settlements remained a possibility after the Final Judgment was entered. Even the language in the Final Judgment reserving jurisdiction over Green Bay and the settlement Fund is not injunctive in character: at most it reserved the possibility that at some future time the district court might be requested to do something in MDL 310.

The treatment of these documents by the lower courts during the past five years further confirms that they are not, individually or collectively, a consent decree. Since they contain no injunctive relief they cannot be decrees in the traditional sense, a fact that is obvious when Green Bay's settlement contract is compared to the plaintiffs' settlement with, for example, the defendant Alton Box Board Company, which consisted of a Settlement Agreement and a separate Consent Decree. See Supplemental Appendix B-1 at B-13. In preliminarily approving the settlements, the district court acknowledged that it was approving settlement agreements. Its discussion of the agreements nowhere suggests that they were viewed

by anyone as consent decrees. *In Re Corrugated,* 1979-1 Trade Cases (CCH) ¶ 62,690 (S.D. Tex. 1979). When it finally approved the settlement agreements in December 1979, the district court once again confined its inquiry to the adequacy and fairness of the settlements pursuant to its obligations under Fed. R. Civ. P. 23(e). It did not refer to the settlements as consent decrees. See, e.g., *In Re Corrguated,* 1980-1 Trade Cases (CCH) ¶ 63,163 (S.D. Tex. 1979). Nor did the Court of Appeals for the Fifth Circuit indicate it was reviewing consent decrees when the district court's final approval was first appealed.[1] In fact, the court of appeals itself indicated that "[t]he district court's most important function in reviewing compromises of class actions is its consideration of the settlement terms." *In Re Corrugated,* 643 F.2d 195, 212 (5th Cir. 1981). Upon remand for additional findings, the district court engaged in a defendant-by-defendant analysis of the settlement agreements, again confining its discussions to the agreements. *In Re Corrugated,* 1981-2 Trade Cases (CCH) ¶ 64,114 (S.C. Tex. 1981). Upon subsequent appeal, the district court was affirmed without any reference to consent decrees. *In Re Corrugated,* 659 F.2d 1322 (5th Cir. 1981).

Although the plaintiffs attempted to enforce their version of the Settlement Agreement by an Order to Show Cause and two motions for summary judgment, even they

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[1]In another case, the court of appeals recognized the distinction between class action settlement agreements for the payment of money, which are merely "ratified" by the district court, under Rule 23(e), and consent decrees containing injunctive provisions which "require more careful scrutiny." *United States v. City of Miami, Florida,* 664 F.2d 435, 441 (5th Cir. 1981).

have never requested an order enforcing a consent decree. The Order to Show Cause concerns only the Settlement Agreement and the Favored Nations Clause and makes no mention of a consent decree. The plaintiffs' subsequent motions for summary judgment are likewise devoid of reference to consent decrees. The first, captioned "Plaintiffs' Motion to Compel Defendant Green Bay Packaging Inc. to Comply with the Terms of its Settlement Agreement," seeks relief based upon the Settlement Agreement and nothing else. The second, entitled "Plaintiffs' Amended Motion to Compel Green Bay Packaging, Inc. to Comply With the Terms of Its Settlement Agreement", is also plainly directed toward enforcing the terms of the Settlement Agreement and makes no reference to consent decrees. It is therefore not surprising that the district court, in summarily granting the plaintiffs' motion, granted plaintiffs the relief requested—enforcement of the Settlement Agreement—without any mention of a consent decree.

Finally, in the subsequent appeal, the parties not once alluded to a consent decree. Instead, plaintiffs maintained that the district court merely enforced the Settlement Agreement to pay the Promissory Note. In short, without urging by any party, the court of appeals, *sua sponte*, imported to this litigation a concept not contemplated by the parties or the district court and totally inapposite to the substance of the parties' agreement.[2]

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[2]The plaintiffs in their response brief have picked up on the consent decree language used by the court of appeals. To the extent that this distinction underlies the result in the

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No matter what label is applied to the Settlement Agreement, Promissory Note and Final Judgment, it is clear that their content is simply inconsistent with the concept of a consent decree. Historically, decrees, including consent decrees, were issued by courts of equity, while judgments were rendered by courts of law. With the merger of law and equity, the Federal Rules provided that a "decree" may be called a "judgment," Fed. R. Civ. P. 54(a). However, the use of the term "judgment" to describe what was historically called a "decree" does not diminish the substantive distinction between a judgment granting a money award for which the right to a jury trial exists and a judgment granting an injunction for which it does not.

That consent decrees are essentially voluntary restraints in the nature of equitable (usually injunctive) relief is plain from the fact that *every* consent decree case cited by plaintiffs involves equitable relief of one form or another. Yet no injunctive relief is granted in the Final Judgment and none is found in the Settlement Agreement. Since the dispute concerns how much money Green Bay owes to the plaintiffs, equitable relief cannot be involved because there is no such thing as an injunction to pay a debt. *U.S. Industries v. An-*

(Continued from previous page)

court of appeals, it is significant to note that on at least two previous occasions the court of appeals has indicated that questions of fact concerning the interpretation of ambiguous settlement agreements are to be resolved by a jury. *Weingart v. Allen & O'Hara, Inc.*, 654 F.2d 1096 (5th Cir. 1981); *Miller v. Baum*, 400 F.2d 176 (5th Cir. 1968).

derson, 579 F.2d 1227, 1230 (10th Cir. 1978).[3] It follows that Green Bay's right to a jury trial should not hinge upon the plaintiffs' erroneous choice of terminology.

II. Green Bay Has Not Waived Its Right to a Jury Trial

Plaintiffs are quite wrong in now arguing that Green Bay has not properly preserved its right to a jury trial. It is probably enough to point out that neither the district court nor the court of appeals found that Green Bay had waived its right to a jury.

Nor could there have been a finding of waiver. Green Bay demanded a jury trial on all issues so triable between Green Bay and any plaintiff that, prior to consolidation of the actions, had actually brought an action against Green Bay. Green Bay's jury demand does not limit the issues as to which Green Bay requested a jury determination; it merely reflects Green Bay's position that it was not obligated to respond to a pleading of any plaintiff who had not formally instituted an action against Green Bay prior to the consolidation order, irrespective of whether that pleading claimed to be a part of the Unified and Consolidated complaint.

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[3]In that case the Tenth Circuit held that use of the extraordinary writ of mandamus was justified. The court said: "If it is a temporary restraining order or an injunction, the order ought to fail as an invalid injunction to pay money with its attendant, but unlawful, possibility of imprisonment for debt. The wisdom of the founding fathers which denied debtors' prisons a place in the American judicial process remains today unimpaired." 579 F.2d at 1229.

In addition, during oral argument before the court of appeals, the panel specifically asked counsel for plaintiffs whether they took the position that Green Bay timely demanded a jury trial. Counsel for the plaintiffs conceded that Green Bay had timely demanded a jury and thereafter consistently reasserted that demand, but then claimed that Green Bay had waived its demand by proceeding with the hearing of December 1982. In rebuttal, Green Bay's counsel directed the panel's attention to the record evidencing the three times during that December hearing that counsel for Green Bay specifically told the district court that a jury must be empanelled to decide the material questions of fact.

Finally, Fed. R. Civ. P. 38 requires that a jury demand be served in the first responsive pleading directed to the issue, but since plaintiffs have not filed any pleadings concerning the ancillary collection action they have been permitted thus far to pursue within the confines of MDL-310, they are in no position to fault Green Bay for the method it was forced to use to bring to the district court's attention its assertion of its right to a jury trial. Moreover, plaintiffs' demanded trial by jury in this action "of all issues triable of right by a jury." Plaintiffs' demand has never been withdrawn and Green Bay is entitled, as a matter of right, to rely on plaintiffs' jury demand as though it were its own. 9 Wright & Miller, *Federal Practice and Procedure: Civil* § 2318 (1971 and 1985 Supp.)

———o———

CONCLUSION

Throughout this litigation the parties, the district court, and the Fifth Circuit have treated the Settlement Agreement as precisely what it is—a contract to pay a debt. No one ever suggested that it was anything more than this until the court below, *sua sponte*, characterized it as a consent decree. Plaintiffs seize eagerly on that characterization and now insist that they are asking for equitable relief in the form of enforcement of a consent decree rather than for a money judgment under a contract of settlement obtained in an action at law. To allow this would undermine fundamental Seventh Amendment principles. Indeed, it is no exaggeration to say that if the ruling of the court of appeals is permitted to stand, equity jurisdiction will, for the first time since *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), be permitted to oust a court of law from jurisdiction over a matter involving a contract to pay a debt where the adequacy of the legal remedy is unchallenged. Such a result would be the first peal of the death knell for this Court's opinions in *Beacon Theatres* and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), and ultimately for the Seventh Amendment itself.

Accordingly, Green Bay respectfully requests that its Petition for Writ of Certiorari be granted and the deci-

sion of the court of appeals be reversed and the cause remanded to the district court for a jury trial.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN
DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. NO. 310

IN RE CORRGUATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO
ALL ACTIONS EXCEPT:

ATLAS CONTAINER CO., INC.
(C.A. No. H-78-916)
CANTRELL AND COCHRANE, INC.
(C.A. NO. H-79-87)
COOK PRODUCE, INC., ET AL.
(C.A. NO. H-78-1387)
DEAN FOOD COMPANY, ET AL.
(C.A. NO. H-78-2004)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. NO. H-78-671)
GREAT NORTHERN PACKAGING CORP., ET AL.
(C.A. NO. H-78-1452)
ITT CONTINENTAL BAKING CO.
(C.A. NO. H-78-376)
METRO MOLDING CORPORATION
(C.A. NO. H-79-1086)
PILLSBURY COMPANY, ET AL.
(C.A. NO. H-79-1044)
ROLLINS CONTAINER, INC.
(C.A. NO. H-79-819)
SUNMARK, INC.
(C.A. NO. H-78-1815)
UNITED FARMERS COOPERATIVE, INC., ET AL.
(C.A. NO. H-77-2158)

FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE OF CLAIMS OF PLAINTIFF CONTAINER PURCHASER SUBCLASS AS TO DEFENDANT GREEN BAY PACKAGING, INC.

(Filed January 25, 1980)

WHEREAS, on December 21, 1979 this Court filed its Order and Memorandum Opinion finally approving, in all respects, the settlement with Defendant Green Bay Packaging, Inc. (hereinafter the "Settling Defendant"), which Order and Memorandum Opinion constitutes its findings of fact and conclusions of law with respect to this final judgment and this final judgment is entered thereon, and

WHEREAS, each of the conditions and events required by said settlement with Settling Defendant to be satisfied or occur prior to the entry of this final judgment has been satisfied or has occurred.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Due and adequate notice was directed to all those persons who are members of the Plaintiff Container Purchaser Subclass, as hereinafter defined, and certain other persons, notifying said persons, among other matters, of the pendency of these actions as class actions, of their right to be excluded from the Plaintiff Container Purchaser Subclass, and of said settlement with Settling Defendant which this Court has finally approved. The giving of said notice was the best notice practicable under the circumstances, and included individual notice to all members of the Plaintiff Purchaser Subclass who could be identified through reasonable effort. The giving of said notice fully complied in every respect with the re-

quirements of Rule 23 of the Federal Rules of Civil Procedure and said settlement with Settling Defendant.

2. Pursuant to Rule 23 of the Federal Rules of Civil Procedure and said settlement with Settling Defendant, this Court hereby dismisses, with prejudice and without costs, all claims of the members of the Plaintiff Container Purchaser Subclass, as hereinafter defined, except the individual claims of any named plaintiff or other member of the Plaintiff Container Purchaser Subclass who is specified in paragraph 4 below as having duly requested exclusion from the Plaintiff Container Purchaser Subclass, against Settling Defendant only, arising under the antitrust laws of the United States or of any state or other jurisdiction, or any similar statutory or common law, which have been, might have been, are now or could be asserted in these actions in connection with corrugated containers and corrugated sheets or which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or corrugated sheets alleged in the Unified and Consolidated Complaint, as amended, on file herein. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court hereby expressly determines that there is no just reason for delay and hereby expressly directs the entry of this judgment of dismissal with prejudice as a final judgment.

3. The term "Plaintiff Container Purchaser Subclass" is defined herein to consist of the following persons:

> All persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers, as defined in the Unified and Consolidated Complaint on

> file herein) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960 to January 25, 1978, except for the members of the Sheet Plant Subclass, as defined and established by this Court's Pretrial Order No. 7, dated December 26, 1978.

The term "Plaintiff Container Purchaser Subclass" also includes the Settlement Class as established pursuant to said settlement with the Settling Defendant. This Court hereby finds and determines that all such persons who have not duly requested to be excluded from the Plaintiff Container Purchaser Subclass are members of the Plaintiff Container Purchaser Subclass.

4. The following persons, and no others, have duly requested to be excluded from the Plaintiff Container Purchaser Subclass, and accordingly are not included in or bound by this final judgment:

> Those persons included on the Amended Opt-Out List of Class Members, filed November 20, 1979 (this Court's Docket No. 1099), except for Jays Food, Inc., which was permitted to withdraw its exclusion by this Court in its Order made January 8, 1980.

5. Without affecting the finality of this judgment in any way, this Court hereby retains continuing jurisdiction over the Plaintiff Container Purchaser Subclass and the Settling Defendant with respect to discovery disputes, as provided in said settlement with Settling Defendant, and this Court hereby retains continuing jurisdiction over the settlement Fund described in said settlement, for the purpose of effectuating the settlement and for the purpose of directing the disposition of the settlement Fund in accordance with the terms of the settlement, including:

(a) Allocating and distributing the settlement Fund among various members of the Plaintiff Container Purchaser Subclass and among other persons and entities; and

(b) Allowing or disallowing applications for attorneys' fees, costs and expenses, and paying any attorneys' fees, costs and expenses allowed by this Court.

6. Nothing in this final judgment shall be deemed to preclude this court from determining hereafter that any person specified in Paragraph 4 above as having duly requested exclusion may be permitted to withdraw their exclusion from and become a member of the Plaintiff Container Purchaser Subclass, which includes the Settlement Class as established pursuant to said settlement with the Settling Defendant and be deemed to be included in and bound by this final judgment dismissing with prejudice the claims described above against the Settling Defendant.

DATED:

/s/ John V. Singleton
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO
ALL CLASS ACTIONS EXCEPT:

FRANKLIN CONTAINER CORP., ET AL,
C.A. NO. H-78-671

AGREEMENT OF SETTLEMENT BETWEEN
CONTAINER PURCHASER AND
SHEET PLANT SUBCLASSES AND
DEFENDANT ALTON BOX BOARD COMPANY

WHEREAS, certain plaintiffs are prosecuting M.D.L. No. 310 now pending before the above-entitled Court (hereinafter "the Court") as a class action;

WHEREAS, the Court ruled in its Order filed on September 6, 1978, that these actions may proceed as a class action on behalf of the class as defined in said Order (hereinafter "the Certified Class");

WHEREAS, the Court ruled in paragraph 4 of Pretrial Order No. 7, filed on December 26, 1978, that the Certified Class shall consist of a Sheet Plant sub-class, as defined in said Order of December 26, 1978, and a Container Purchaser sub-class comprised of the remainder of the members of the Certified Class;

WHEREAS, plaintiffs have alleged that defendant Alton Box Board Company (hereinafter along with all past and present subsidiaries and affiliates, referred to as "Settling Defendant") was a participant in an unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers and sheets and Settling Defendant has denied the material allegations of plaintiffs' complaint and raised certain affirmative defenses thereto;

WHEREAS, Settling Defendant, denying wrongdoing of any kind whatsoever, has nevertheless agreed to enter into this Agreement of Settlement to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation;

WHEREAS, plaintiffs have conducted investigations into the facts of these cases, reviewed at length and analyzed the grand jury documents produced by the defendants, the government trial exhibits made available to plaintiffs, the testimony at trial of the companion criminal cases, certain grand jury and government interview transcripts produced by the government, have conducted formal and informal investigations, including document and deposition discovery regarding the claims of the plaintiffs, and have presented at trial much of their case in chief against Settling Defendant;

WHEREAS, plaintiffs have conducted an investigation into the corporate financial records and the financial condition of Settling Defendant with the assistance of Price Waterhouse & Co.;

WHEREAS, plaintiffs have concluded that a settlement with Settling Defendant in the amount and on the terms hereafter set forth is in the best interests of plaintiffs and the Container Purchaser and Sheet Plant subclasses;

— NOW, THEREFORE, it is agreed by and among the undersigned that these class actions be settled and compromised with Settling Defendant, upon approval by the Court, after a hearing as provided for herein, and with plaintiffs expressly retaining their rights against non-settling defendants, on the following terms and conditions:

1. The undersigned counsel represent that they are fully authorized to enter into the terms and conditions of, and execute, this Agreement.

2. The undersigned agree to undertake their best efforts, including all steps and efforts contemplated by this Agreement, and any other steps and efforts which may become necessary by order of the Court or otherwise, to effectuate this Agreement and the settlement set forth herein.

3. Subject to the Court's approval and for the purposes of this Agreement only, the undersigned agree that there shall be designated the following Settlement Class in M.D.L. 310:

> All persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers as defined in the Unified and Consolidated Complaint on file herein) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period of January 1, 1960, to January 25, 1978, except for the following persons who are not included in said Settlement Class:
>
> > Those persons included on the Amended Opt-out List of Class Members, filed November 20, 1979 (the Court's Docket No. 1099), other than those

persons who have been permitted by the Court to withdraw their requests for exclusion and to be included in the Certified Class.

For the purposes of this Agreement, said Settlement Class shall consist of the following sub-classes:

(a) A Container Purchaser sub-class which shall be identical to the Container Purchaser sub-class as defined and established by the Court in its Pretrial Order No. 7, dated December 26, 1978; and

(b) A Sheet Plant sub-class which shall be identical to the Sheet Plant sub-class as defined and established by the Court in said Order.

4. Said Settlement Class shall be represented by the class representatives designated by the Court in its Order dated October 26, 1978, as modified by the Court's Pretrial Order No. 7, dated December 26, 1978, or as may be otherwise ordered by the Court, who have entered into this Agreement.

5. In full and complete settlement of the claims asserted in M.D.L. 310 by the members of the Settlement Class against Settling Defendant and subject to the remaining provisions hereof, Settling Defendant shall pay Five Million Four Hundred Thousand ($5,400,000.00) Dollars, in the manner described hereinafter. In addition Settling Defendant agrees that the Court shall forthwith enter a Consent Decree in the form annexed hereto as Exhibit A. Within five days after the execution of this Agreement, Settling Defendant shall deposit, in escrow, as described hereinafter, One Million Six Hundred Thousand ($1,600,000.00) Dollars; one year from the date of execution of this Settlement Agreement, Settling Defendant shall deposit an additional One Million Nine Hundred Thousand ($1,900,000.00) Dollars into escrow, and two

years from the date of execution of this Settlement Agreement, Settling Defendant shall pay an additional One Million Nine Hundred Thousand ($1,900,000.00) Dollars into escrow. The deferred payments shall be guaranteed by a letter or letters of credit in a form satisfactory to plaintiffs' counsel and issued by a bank or banks satisfactory to plaintiffs' counsel. Such letters of credit shall be deposited within 30 days of the execution of this agreement, such deposit being a material condition of this agreement. Said amount and the interest thereon shall be referred to hereinafter as the "Fun". Settling Defendant further agrees that the Court may from time to time, subsequent to preliminary approval of this settlement, order that amounts not to exceed Nine Hundred Twenty Thousand Dollars ($920,000.00) in the aggregate shall be paid out of the Fund to be used for the payment of costs and expenses (excluding the payment of any attorneys' fees) incurred or which may be incurred in connection with the prosecution of this litigation or in connection with the giving of notice to the members of the class, or in administration or distribution of this or other class action settlements or judgments in M.D.L. 310. To the extent that any portion of the $920,-00.00 is so paid out, the amount paid out shall not be refundable to Settling Defendant in the event the settlement set forth in this Agreement is finally disapproved. Except as otherwise expressly provided herein, Settling Defendant shall not be liable for any costs or attorneys' fees, but all such costs and attorneys' fees as approved by the Court shall be paid out of the Fund. In no event shall Settling Defendant be under any obligation to deposit monies in excess of Five Million Four Hundred Thousand ($5,400,-000.00) Dollars in connection with this Agreement. In the event federal income tax liability is finally assessed

against and paid by Settling Defendant as a result of income earned in the Fund, Settling Defendant shall be entitled to reimbursement of such payment from the Fund. Settling Defendant will use its best efforts to resist any such assessment or payment.

6. The Fund shall be invested pursuant to the Escrow Agreement attached as Exhibit B hereto and made a part hereof. Any interest earned on the Fund shall become and remain a part thereof. Settling Defendant, from time to time, shall receive reports covering the status of the fund. The escrow agent and plaintiffs will be reimbursed and indemnified out of the Fund for all costs and expenses incurred in the administration and distribution of the Fund. Disbursements for such costs and expenses shall be made from time to time upon the approval of the Court. Settling Defendant shall have no responsibility with respect to the allocation, administration, or distribution of the Fund, except as expressly provided herein.

7. Except as provided in paragraph 5 of this Agreement, no distribution of the Fund shall be made unless and until all of the following conditions precedent are met; (i) the Court has finally approved this Agreement and the settlement set forth herein pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, (ii) the entry of the Court's final judgment approving this Agreement and the settlement set forth herein and dismissing with prejudice the claims of the Settlement Class members against Settling Defendant, (iii) the final affirmance on appeal of, or the final dismissal of an appeal from or the expiration (without the filing or noticing of an appeal) of the time to appeal from said final judgment, and (iv) an order of the Court allowing such dis-

tribution. Subject to the foregoing, (a) distributions from the Fund approved by the Court may be made to pay approved costs and expenses, past and future, incurred by plaintiffs or their counsel in these M.D.L. proceedings, (b) such distribution may be made from time to time on an interim basis prior to the time when the remaining balance of the Fund may be distributed to Settlement Class members, and (c) all such interim distributions shall be paid from the Fund only if authorized or approved by and upon the application of the Plaintiffs' Steering Committee and upon approval of the Court.

8. Upon the Court's approval of this Agreement and the settlement set forth herein, pursuant to said Rule 23(e), said final judgment shall be entered which shall provide that all claims of the Settlement Class as against Settling Defendant arising under the antitrust laws of the United States or of any state or other jurisdiction, or any similar statutory or common law, which have been, might have been, are now or could be asserted in these actions in connection with corrugated containers and corrugated sheets, or which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or corrugated sheets alleged in the Unified and Consolidated Complaint on file herein, or any amendments thereto, shall be dismissed with prejudice.

9. The settlement set forth in this Agreement shall not become effective unless and until this Agreement is finally approved in all respects by the Court (including the approval of the Settlement Class, as defined in paragraph 3 hereof). In the event that the Court refuses to approve this Agreement or any material part of it, or in

the event that the conditions precedent for distribution under paragraph 7 are not satisfied, this entire Agreement shall become null and void unless all parties promptly agree to proceed with the settlement as and if modified by the Court. In the event this Agreement becomes null and void for any reason, the Fund, including interest thereon, shall be disbursed promptly to Settling Defendant, except that any funds actually expended or expenses incurred as outlined in paragraph 5 above shall not be refundable to Settling Defendant, and except that any costs of administering the Fund or the settlement set forth in this Agreement, exclusive of attorneys' fees, shall first be deducted before the Fund is returned to Settling Defendant. It is expressly understood and agreed that this Settlement Agreement shall remain in full force and effect as to the Settlement Class set forth herein notwithstanding any revocation or modification by any court of the Court's September 6, 1978, Class Certification Order, or paragraph 4 of the Court's December 26, 1978, Pretrial Order No. 7 with respect to the propriety of class certification for litigation purposes.

10. The fact of this settlement with Settling Defendant shall not be construed to affect, in any manner whatsoever, any joint or several liability of any of the non-settling defendants for the conspiracy and their acts alleged in the complaint, indlucing (sic) but not limited to, any acts of Settling Defendant, any putative common law rule or practice, or any federal, state or local statute or Court decision to the contrary notwithstanding. Claimants upon the Fund prior to participation therein will execute and deliver covenants not to sue Settling Defendant, or any of its present or former officers, direc-

tors, or employees, under the antitrust laws of the United States or of any state or other jurisdiction or any similar statutory or common law, asserting claims which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or sheets alleged in the Unified and Consolidated Complaint on file herein, as amended, or otherwise raised, on the checks or claim forms.

11(a). Settling Defendant agrees that it will take no actions to hinder or impede plaintiffs during the remainder of the present trial of this class action; and that upon the execution of this agreement it will take no further steps or actions in furtherance of any cooperative or joint defense effort during the remainder of the trial, or upon any appeal of the outcome of this trial or retrial other than necessary for an orderly transition of joint defense efforts to date.

(b) Settling Defendant will, upon request by plaintiffs, produce any documents, information or any current employee who was listed on Settling Defendant's Trial Witness List to appear at informal conferences or consultations or as a witness at trial without requirement of subpoena, unless, for reasons beyond its control, Settling Defendant cannot produce such documents, information or witnesses. In such case, Settling Defendant will advise plaintiffs' trial counsel in writing within two (2) days after the request is made. Plaintiffs will limit their requests to production of documents, information and current employees for the sole purpose of rebutting any part of the defense presented by the remaining non-settling defendants at the trial of this matter, and only to the extent that the defense is related to matters per-

taining specifically to Settling Defendant. Nothing in this paragraph 11(b) shall require Settling Defendant or its counsel to breach any privilege belonging to Settling Defendant and non-settling defendants or others which arose by reason of any joint defense agreements or efforts. Notwithstanding the foregoing, Settling Defendant shall not be required to produce any such employee as a witness at trial who advises Settling Defendant that he intends to invoke his rights under the Fifth Amendment to the Constitution of the United States. In that event, such employee shall be produced for deposition by telephone or otherwise, at the request of plaintiffs.

12. This Agreement does not prejudice the rights of Settling Defendant or any subsidiary, affiliate or division of Settling Defendant acquired on or after December 26, 1978, who might otherwise be members of any class created in M.D.L. 310, including the Settlement Class designated in paragraph 3 hereof to participate as members of any such class.

13. Entry of the Consent Decree in the form annexed to this Agreement as Exhibit "A" should not be made until (i) the Court has approved this Agreement and the settlement set forth pursuant to Rule 23(e), Federal Rules of Civil Procedure, and (ii) the entry of the Court's final judgment approving this Agreement and the settlement set forth herein and dismissing with prejudice claims of the Settlement Class members against Settling Defendant.

14. This Agreement may be executed in counterpart by the parties hereto and shall become effective upon its execution by the undersigned counsel as of the 11th day of July, 1980.

MANDELL & WRIGHT
Stephen D. Susman, Chairman
Plaintiffs' Steering Committee
806 Main Street, 21st Floor
Houston, Texas 77002

McGOVERN, OPPERMAN & PAQUIN
Vance K. Opperman, Vice Chairman
Plaintiffs' Steering Committee
1100 National City Bank Building
Minneapolis, Minnesota 55402

By: /s/ Stephen D. Susman

On Behalf of Plaintiffs' Steering Committee (except James Sloan and Granvil Specks) and All Designated Class Representatives of the Container Purchaser Sub-Class (except Ilikon Corporation)

BERGER & MONTAGUE, P.C.
H. Laddie Montague
1622 Locust Street
Philadelphia, Pennsylvania 19103

MAUN, GREEN, HAYES, SIMON,
MURRAY AND JOHANNESON
Lawrence J. Hayes
332 Hamm Building
St. Paul, Minnesota 55155

By: .....

On Behalf of All Designated Class Representatives of the Sheet Plant Sub-Class (except Great Northern Packaging Corp.)

HOAGLAND, MAUCKER, BERNARD &
ALMETER
Karl K. Hoagland, Jr.
Robert B. Maucker
401 Alton Street
Alton, Illinois 62002

Cox & Smith, Inc.
J. Burleson Smith
Keith E. Kaiser
600 National Bank of Commerce Bldg.
San Antonio, Texas 78205

By: .....

On Behalf of Defendant
Alton Box Board Company

Exhibit "B"

IN THE DISTRICT COURT OF
THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. NO. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO
ALL CLASS ACTIONS EXCEPT:

FRANKLIN CONTAINER CORP., ET AL.
(C.A. NO. H-78-671)

CONSENT DECREE

WHEREAS, plaintiff Atlas Container filed its complaint herein on February 1, 1978, plaintiffs Great Northern Packaging Corp. and Huron Packaging Corp. filed their complaint on October 25, 1978, and plaintiff Rollins Container, Inc. filed its complaint herein on February 20, 1979, and

WHEREAS, each of the aforesaid plaintiffs (the "Settling Plaintiffs") filed on its own behalf and on behalf of a class as defined in the respective complaints; and

WHEREAS, the Court certified, on September 6, 1978, a class consisting of all persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendants, at any time during tme period from January 1, 1960 to January 25, 1978, and the Court on December 26, 1978, certified two subclasses thereof including a Sheet Plant Subclass consisting of all Sheet Plants (as defined in the Court's Order of December 26, 1978) which purchased corrugated sheets in the United States during the period January 1, 1960, to January 25, 1978; and

WHEREAS, Rollins Container, Inc. was named as third representative of the Sheet Plant Subclass pursuant to Pretrial Order No. 16 dated June 8, 1979; and

WHEREAS, the above-named plaintiffs (or a majority of them), as representatives of the Sheet Plant Subclass, and the undersigned defendant (hereinafter referred to as "Settling Defendant"), a defendant in one or more of these three actions, by its respective attorneys, have agreed to entry of this Consent Decree without admission of any liability and without trial or adjudiciation of any issue of fact or law in the above proceedings, and without this Consent Decree constituting evidence or any admission by any party signatory hereto with respect to any such issue, and

WHEREAS, the Consent Decree and the injunction ordered and granted herein, pursuant to Rule 65(d) of the Federal Rules of Civil Procedure, constitutes an integral part of the Settlement Agreement, dated ———,

of the above actions entered into by Settling Defendant and the Settling Plaintiffs, acting as representatives of the Sheet Plant Subclass;

NOW, THEREFORE, following appropriate research, investigation, inquiry and negotiations, but without trial or adjudication of any issue of fact or law in the above proceeding, and upon the consent of the signatory parties and with the approval of this Court pursuant to Rule 23 of the Federal Rules of Civil Procedure, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

I.

JURISDICTION

This Court has jurisdiction of the subject matter of this action and of each of the parties to this Consent Decree.

II.

DEFINITIONS

A. "Corrugated sheets" consist of linerboard (a flat paper product manufactured in mills and sold in rolls) and medium (a paper product manufactured in mills and sold in rolls), glued together in layers in which the fluted medium is between the two or more layers of linerboard.

B. "Corrugated containers" are containers made of corrugated sheets.

C. A "sheet plant" is defined as a person (excluding present defendants in MDL 310 and all subsidiaries and affiliates of such defendants) who (a) purchased cor-

rugated sheets, (b) manufactured and sold corrugated containers and/or corrugated fillers, pads and partitions which were sold for use in or with corrugated containers, and (c) did not manufacture corrugated sheets.

III.

APPLICABILITY AND NOTICE

Within thirty (30) days after the effective date of this Consent Decree, Settling Defendant is ordered and directed to deliver a copy of the Consent Decree to each of its officers and regional managers, plant managers and sales managers, whose product responsibility includes corrugated sheets or corrugated containers, and thereupon file an affidavit with the Clerk of the Court, with a copy thereof to the attorneys for the class, that is has done so, which affidavit shall set forth the name of each person so served.

The effective date of this consent decree is defined in Section VIII, *infra*.

IV.

PRICE FIXING-PREDATORY PRICING

Settling Defendant is enjoined and restrained from directly or indirectly entering into, adhering to, enforcing, furthering, or maintaining any unlawful combination, conspiracy, agreement, or understanding with any other manufacturer or seller of corrugated containers or corrugated sheets to:

(a) Fix, depress, raise, stabilize or otherwise maintain prices, or to exchange prices, or price formulae, or other terms of conditions of and for the sale of corru-

gated sheets to any member of members of the Sheet Plant Subclass;

(b) Divide, allocate, or otherwise apportion customers which are members of the Sheet Plant Subclass or markets composed of such customers with respect to corrugated sheets;

(c) Refrain from soliciting the business of or refrain from dealing with, any customer or potential customer for corrugated sheets which is a member of the Sheet Plant Subclass;

(3) Engage in a practice of predatory pricing with respect to corrugated sheets in relation to corrugated containers or corrugated containers in relation to corrugated sheets, including, but not limited to, a price squeeze affecting members of the Sheet Plant Subclass.

V.

MONOPOLIZATION — PREDATORY PRICING

Settling Defendant is enjoined and restrained from monopoliizng, conspiring to monopolize, or attempting to monopolize any relevant geographic market for corrugated containers or corrugated sheets in violation of the federal antitrust laws by engaging in a practice of predatory pricing with respect to corrugated sheets in relation to corrugated containers or corrugated containers in relation to corrugated sheets.

VI.

RECORD RETENTION

A. For the purpose of assuring and securing compliance with this Consent Decree, Settling Defendant shall

retain during the period of this Consent Decree such books and records, including, but not limited to, correspondence and memoranda, maintained in the usual and ordinary conduct of its corrugated sheet and corrugated container business as may be necessary to determine costs, prices, profits, transactional data, and expense accounts for the persons described in Section III, *supra*.

B. In the event that any Settling Plaintiff or any member of the Sheet Plant Subclass has reasonable cause to believe that the terms and conditions of this Decree may not have been complied with by any plant or plants of Settling Defendant, then such Settling Plaintiff or member of the Sheet Plant Subclass may petition this Court, on a showing of such reasonable cause, for an Order directing such Settling Defendant to show cause why Settling Defendant should not be required to produce all books and records of such plant or plants of such Settling Defendant relevant to such alleged non-compliance with the terms and conditions of this Decree, subject to the entry of an appropriate protective order.

C. No information obtained by the means provided in Subparagraph B of this Section shall be divulged to any person or used for any purpose other than in the course of legal proceedings for the purpose of securing compliance with this Consent Decree, or as otherwise required by law.

VII.

RETENTION OF JURISDICTION

Until the termination of this Consent Decree, jurisdiction is retained by this Court for the purpose of enabling

any of the parties to this Consent Decree to apply to this Court at any time for such further order and directions as may be necessary or appropriate for the construction, implementation, or carrying out of this Consent Decree, for the enforcement of compliance therewith, and for the punishment of any violation.

VIII.

EFFECTIVE DATE OF DECREE

This Consent Decree shall become effective upon approval by the District Court in the above-captioned actions in accordance with and as provided in the Settlement Agreement executed and delivered by the parties concurrently herewith. Any appeal thereof will not delay the effective date of this Consent Decree. This Consent Decree shall, subject to the terms of the Settlement Agreement, remain in effect until January 31, 1984, at which time it shall terminate.

IX.

CONSTRUCTION, INTERPRETATION AND ENFORCEMENT OF THIS DECREE

A. This Consent Decree shall be construed, interpreted and enforced so as to carry out its principal purpose of protecting competition.

B. Nothing contained in this Consent Decree shall be construed to prohibit conduct lawful under the antitrust laws, including the Sherman Act, the Clayton Act and the Robinson-Patman Act, nor shall anything in this Consent Decree be construed to authorize conduct prohibited by such antitrust laws.

X.

AMENDMENTS

This Decree may be amended in writing but only upon consent of the attorneys for the Sheet Plant Subclass (or a majority of them) and counsel for the settling defendant with the approval of the Court, with notice to all Subclass representatives, but without further notice to members of the Sheet Plant Subclass, unless otherwise directed by this Court.

DATED:

Representatives of the Sheet Plant Subclass

ROLLINS CONTAINERS, INC.

By: _____
Its Attorney

ATLAS CONTAINER

By: _____
Its Attorney

ALTON BOX BOARD COMPANY

BY: _____

ORDERED, ADJUDGED AND DECREED ON _____, 1980.

_____
Judge of the District Court